Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

COMPAQ COMPUTER CORPORATION,
*Petitioner,*

v.

STEPHEN GRIDER and BEVERLY L. GRIDER,
Individually and on Behalf of Those Similarly Situated,
*Respondents.*

**On Petition for a Writ of Certiorari to the Court of Civil Appeals of Oklahoma**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Plaintiffs filed this action in Oklahoma state court, asserting breach of express warranty claims on behalf of a putative nationwide class of persons who purchased allegedly defective computers from Compaq. Before initiating this action in Oklahoma, the same putative nationwide class represented by the same counsel brought the same claims against Compaq in Texas state court. The Texas Supreme Court decertified the nationwide class, holding that Texas does not have a cognizable interest in the claims of all class members and, therefore, that Texas law could not be applied to the non-Texas claimants in the putative class. Notwithstanding the Texas Supreme Court's decision, the Oklahoma Court of Civil Appeals affirmed (a) the certification of the very same nationwide class, and (b) a ruling that Texas law should govern the claims of all class members—Texas and non-Texas claimants alike.

The questions presented are:

(1) Whether, in light of the Texas Supreme Court's decision regarding the proper reach of Texas law, the Oklahoma Court of Civil Appeals can, consistent with the Full Faith and Credit Clause, reach a contrary conclusion regarding Texas's interest in the claims of non-Texas class members and apply Texas law in a manner expressly rejected by the Texas Supreme Court.

(2) Whether, given that the proposed nationwide class rejected in the earlier action is identical to the class proposed in the Oklahoma action, the decision by the Texas Supreme Court should bind plaintiffs and preclude them from relitigating in Oklahoma the same issues regarding class certification and choice of law.

(3) Whether the choice-of-law ruling of the Oklahoma Court of Civil Appeals is inconsistent with the requirements of the Due Process and Full Faith and Credit

Clauses, as construed by this Court, in that it applies Texas law to all claimants in a nationwide class regardless of whether Texas has a cognizable interest in having its law apply to non-Texas claimants and even when material conflicts exist between Texas law and the laws of others states.

## PARTIES TO THE PROCEEDINGS

The caption includes all parties to the proceedings.

## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Hewlett-Packard Company ("HP") is the successor by merger to Petitioner Compaq Computer Corporation. HP has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

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Petitioner Compaq Computer Corporation ("Compaq"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the Court of Civil Appeals of Oklahoma, Third Division, in this case.

## OPINIONS BELOW

The denial of review by the Supreme Court of Oklahoma (App. A, 1a) is unreported. The decision of the Oklahoma Court of Civil Appeals regarding class certification (App. B, 2a-25a) is unreported. The opinions of the Oklahoma district court granting class certification (App. C, 26a-31a) and declaring that Texas law governs all claims (App. F, 38a-46a) are unreported.

## JURISDICTION

The judgment of the Oklahoma Court of Civil Appeals was entered on October 13, 2006. On March 26, 2007, the Supreme Court of Oklahoma denied Compaq's timely petition for review. On June 19, 2007, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. CONST. amend. XIV, § 1.
>
> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.
>
> U.S. CONST. art. IV, § 1.
>
> [The] records and judicial proceedings [of a State court] . . . shall have the same full faith and credit in every

> court within the United States . . . as they have by law or usage in the courts of [the] State . . . from which they are taken.
>
> 28 U.S.C. § 1738.

## STATEMENT OF THE CASE

### A. Texas Proceedings

On June 4, 2003, Stephen and Beverly Grider brought claims in Oklahoma state court on behalf of a putative nationwide class alleging that Compaq breached its express limited warranty by selling computers with allegedly defective floppy disk controllers ("FDCs"). In their complaint, the Griders alleged that the FDCs may fail to detect that data has been written to or read from a floppy disk incorrectly. The Griders' complaint seeks damages and other relief on behalf of a nationwide class of approximately 1.7 million purchasers of certain Compaq computer models containing the allegedly defective FDCs. App. 5a.

This is not the first action raising such claims on behalf of this putative class. The Texas counsel representing the Griders filed an action in Texas state court in January 2000 asserting precisely the same claims on behalf of the same class of purchasers. As in the Griders' Oklahoma action, the Texas plaintiffs sought declaratory relief and damages on the grounds that Compaq sold certain computer models containing allegedly defective FDCs.[1]

In the Texas action, the trial court certified the proposed nationwide class under Texas Rule of Civil Procedure 42(b)(2) and (b)(3), and the court of appeals affirmed. App. 47a-48a. In certifying the nationwide class, the Texas trial

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[1] In neither action, however, did plaintiffs rely on allegations that any consumer's computer actually malfunctioned as a result of the alleged FDC error. Rather, plaintiffs claimed only that their computers were "defective in the box" because their FDCs allegedly did not comply with unspecified industry standards or Compaq specifications.

court ruled that it did not need to make a choice-of-law determination in order to certify the class. App. 67a-68a. Nonetheless, the trial court identified the choice-of-law ruling that it was "likely [to] make," stating that it "believe[d] that it can properly apply Texas law to all claims covered by this nationwide class action." App. 68a (quotations omitted).

On May 7, 2004, in *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657 (Tex. 2004), the Supreme Court of Texas reversed the certification of the nationwide class. App. G, 47a-85a. In so ruling, the Texas Supreme Court expressly rejected the trial court's assertion that Texas law could govern the claims of all class members. App. 83a-85a.

Following Texas law and this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), the Texas Supreme Court properly determined that Texas law could be applied to the entire nationwide class only if Texas had a cognizable interest in adjudicating the claim of each class member. App. 83a (citing *Shutts*, 472 U.S. at 821-22). The Texas Supreme Court also noted that, absent a contractual choice-of-law provision, Texas's Business and Commercial Code permits Texas law to govern warranty claims only if the "'transaction[] bear[s] an appropriate relation to this state.'" App. 83a (quoting Tex. Bus. & Com. Code § 1.301(a) (2007) (alterations in original)).

Considering both the constitutional restrictions articulated in *Shutts* and the statutory limits of Texas law, the Texas Supreme Court concluded that Texas law could not be applied to the claims of non-Texas consumers because Texas does not have a cognizable interest in such claims. App. 83a-85a. The *LaPray* Court concluded that Texas's interest is limited to compensating consumers, and further determined that other states have comparable compensation interests with respect to their own consumers. App. 84a ("All these fifty-one relevant jurisdictions are likely to be interested in ensuring that their consumers are *adequately compensated* for a breach of warranty." (emphasis added)). In other words, the

*LaPray* court reasoned that because Texas warranty law is concerned with compensating consumers—rather than, for example, deterring Texas businesses from acting contrary to Texas law[2]—Texas does not have a cognizable interest in applying its warranty law to the claims of non-Texas consumers. The Texas Supreme Court declared: "Texas law may not provide sufficient consumer protection in the view of other states; indeed, as the home state of the manufacturer, Texas's policies might tend to favor those interests over consumers." *Id.* (citation omitted). The Texas Supreme Court concluded that "[t]he trial court abused its discretion, therefore, in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims." App. 85a.

The Texas Supreme Court's decision in *LaPray* thus reached two critical conclusions: (1) that Texas does not have a cognizable interest in having its law govern the warranty claims of non-Texas residents where the product was purchased and used outside of Texas; and, therefore, (2) that Texas warranty law—for both statutory and constitutional reasons—cannot be applied to such claims.

### B. Oklahoma Proceedings

On June 4, 2003—after the Texas trial court had certified the nationwide class, but before the case reached the Texas Supreme Court—plaintiffs' counsel filed this action in Oklahoma, asserting claims identical to those raised in the Texas

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[2] Compare, for instance, Texas's stated interest in applying its securities regulations in such a manner. *See Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 440 (Tex. 2007) ("Texas has a strong interest in regulating the sale of securities in *and from* the state. The Section 12 registration provisions indemnify investors victimized by violations of the Texas Securities Act, *encourages compliance* with its regulatory and disclosure provisions, creates an incentive for its private enforcement, and guards the integrity of the state's securities industry by protecting resident sellers who operate in compliance with the law." (emphasis added)).

action. App. 3a-5a. Merely substituting the Griders as the named plaintiffs, the Oklahoma action sought certification of an identically-defined nationwide class consisting of the very same 1.7 million consumers who purchased allegedly defective Compaq computers. App. 5a.

The filing of this action in Oklahoma despite the fact that a nationwide class already had been certified in Texas was no coincidence. Plaintiffs filed this action less than four months after the Oklahoma Supreme Court handed down its decision in *Ysbrand v. DaimlerChrysler Corp.*, 81 P.3d 618 (Okla. 2003), *cert. denied*, 542 U.S. 937 (2004), plainly seeking to take advantage of the favorable choice-of-law rules adopted in that case. In *Ysbrand*, the Oklahoma Supreme Court affirmed the certification of a nationwide class action asserting breach of warranty claims against automaker Daimler-Chrysler. Recognizing the problem of certifying a nationwide class action involving claims governed by the laws of many different states, the court avoided the issue by applying Oklahoma's choice-of-law principles to the class as a whole rather than each class member individually. Oklahoma's choice-of-law rules embody a "most significant relationship" test that "determines which state's law is most directly connected to the parties and the transaction." 81 P.3d at 625. Applying this test to the entire class rather than individual claims, the court ruled that the interest of states where vehicles were purchased (the class members' home states) was less significant than the interest of the state of defendant's principal place of business. *Id.* at 625-26.

Because the Griders' Oklahoma action was duplicative of the case pending in Texas, and so that the Oklahoma courts could have the benefit of the Texas Supreme Court's decision in *LaPray*, a stay was entered in the Oklahoma proceedings. On June 18, 2004, less than a month after the Texas Supreme Court decertified the nationwide class, the Griders moved to lift the stay. App. 34a. On October 26, 2004, on plaintiffs' motion to determine applicable law, the Oklahoma trial court

concluded that Texas law governed the claims of all class members, Texas and non-Texas claimants alike. App. F, 38a-46a. The Oklahoma trial court did not address the Texas statute that expressly limits the application of Texas law to transactions that "bear an appropriate relation" to Texas. The court did acknowledge, however, that the Texas Supreme Court previously had concluded that Texas did not have cognizable interests in the claims of non-Texas claimants. App. 40a. The trial court nevertheless dismissed the notion that the Texas Supreme Court's decision should be controlling on the proper reach of Texas law. *Id.*

In refusing to abide by the Texas Supreme Court's conclusion that Texas lacks a cognizable interest in the claims asserted by non-Texas residents in this case, the Oklahoma trial court arrogated unto itself the authority to determine not only Texas's interests in such claims, but also the proper reach of Texas substantive law. The Oklahoma trial court declared that it was compelled to reach this conclusion by Oklahoma's choice-of-law rules as set forth in *Ysbrand*. App. 44a. In fact, because of *Ysbrand*, the trial court applied Texas law without inquiring into whether material conflicts existed between Texas law and the law of other potentially interested jurisdictions. App. 44a-45a. In applying Texas law, the court also ignored the named plaintiffs' significant contacts with Oklahoma and their stated expectations that Oklahoma law would apply. As the record demonstrates, the Griders live in Oklahoma, purchased their computer in Oklahoma, used their computer in Oklahoma, and even testified that they expected Oklahoma law to govern their claims. Nonetheless, the trial court found that Texas law should apply.

Recognizing that its choice-of-law decision raised "a difficult and important public policy issue potentially implicating comity between Oklahoma and an adjoining sister state, Texas, and the rights of sister states under the United States Constitution," App. 35a, the trial court certified its choice-of-law decision for interlocutory appeal directly to the Okla-

homa Supreme Court. App. E, 33a-36a. The trial court's certification order acknowledged that the decision to apply Texas law to the entire class directly conflicted with the decision of the highest court of a sister state considering the same choice-of-law issue "on the same warranty claim brought against the same defendant." App. 35a.

In its petition for review in the Oklahoma Supreme Court, Compaq asserted that the doctrine of comity and the Full Faith and Credit Clause required Oklahoma to respect and abide by the Texas Supreme Court's conclusion that Texas law cannot be applied to the claims of all class members. Compaq also argued that application of Texas law to each claim asserted in the nationwide class action was inconsistent with this Court's holding in *Shutts* that the Constitution precludes applying a single state's law to all claims in a nationwide class action where that state lacks a cognizable state interest in the claims of each class member and where material conflicts in law exist. The Oklahoma Supreme Court denied review of the trial court's choice-of-law decision. App. D, 32a.

After the Oklahoma Supreme Court declined review, plaintiffs moved for class certification, relying heavily on the evidentiary record developed in the Texas action. On September 23, 2005, the trial court certified the same nationwide class previously certified and then decertified in Texas. App. C, 26a-31a.

Appealing the trial court's certification order to the Oklahoma Supreme Court (which, in turn, assigned the case to the Court of Civil Appeals), Compaq again argued that the application of Texas law was contrary to *LaPray* and thus violated the doctrine of comity and the dictates of the Full Faith and Credit Clause. Compaq also argued that the trial court's choice-of-law inquiry failed to consider whether Texas had a cognizable interest in the claims of each individual class member and thus conflicted with this Court's decision in *Shutts*. On October 13, 2006, the Court of Civil Appeals affirmed the trial

court's certification of the nationwide class, rejecting each of Compaq's arguments. App. B, 2a-25a.

Like the trial court, the Court of Civil Appeals felt compelled by *Ysbrand* to affirm the application of Texas law to the entire class despite Texas's stated conclusion that Texas law could not properly apply. App. 15a n.5 ("We are not free to ignore the explanation of Oklahoma law by the Oklahoma Supreme Court set forth in *Ysbrand*."). Following *Ysbrand*, the Court of Civil Appeals conducted the choice-of-law interest analysis at the class level, rather than considering the individual claims of each class member. App. 13a (finding the dispositive question was whether "where the computers were purchased is more significant to the parties and the litigation than . . . the principal place of business of the seller"). The court reasoned that this approach was necessary because, according to *Ysbrand*, "'[t]he needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions.'" *Id.* (quoting *Ysbrand*, 81 P.3d at 626).

In reaching this conclusion, the Court of Civil Appeals rejected Compaq's argument that, under both the doctrine of comity and the Full Faith and Credit Clause, the court was required to respect and abide by the Texas Supreme Court's decision in *LaPray*. App. 11a-15a. Asserting that *LaPray* did not announce Texas's interest in such claims as a matter of law, the Court of Civil Appeals interpreted *LaPray* to hold only that the Texas plaintiffs failed to demonstrate, on the record presented there, that Texas had a superior interest to other states. App. 12a. Misconstruing *LaPray* as turning on evidentiary issues, and ignoring the fact that the evidentiary record in both cases was nearly identical, the Court of Civil Appeals concluded that *LaPray* did not have sufficiently "definitive qualities" to preclude Oklahoma courts from revisiting the issue of Texas's interests in this matter. *Id.*

Ultimately, the Court of Civil Appeals concluded that, notwithstanding the comity owed to the decisions of the courts of sister states, Oklahoma would not "abandon its own procedural law in matters involving multistate actions." *Id.*

Compaq sought review in the Supreme Court of Oklahoma. In support of Compaq's petition, the State of Texas filed an amicus brief expressing its strong interest in the proper application of its consumer protection laws, and urging that review be granted and that the Oklahoma courts abide by *LaPray*. Nonetheless, the Supreme Court of Oklahoma denied Compaq's petition for a writ of certiorari. App. A, 1a.

## REASONS FOR GRANTING THE PETITION

This case presents issues of national importance regarding the authority of state courts to apply another state's law to all claimants in an alleged nationwide class. The issues are particularly acute in this case because the state court decision at issue came *after* the highest court of the state whose law is being applied held that that state lacks a cognizable interest in the claims of out-of-state members of the purported nationwide class.

In applying Texas law to the claims of the nationwide class, the Oklahoma Court of Civil Appeals knowingly refused to give effect to a decision of the Texas Supreme Court explicitly deciding Texas's interest in precisely the same claims asserted on behalf of precisely the same class. Because *LaPray* conclusively determined the proper application of Texas law in this case, the Oklahoma courts were obliged to follow and give effect to that determination. The failure to do so is fundamentally inconsistent with the full faith and credit due to the dispositions of the courts of sister states.

Absent this Court's intervention, Compaq will be forced to litigate the claims of a nationwide class action under Texas law, despite the fact that the Texas Supreme Court affirmatively disclaimed a cognizable interest in having Texas law

applied to the identical claims of non-Texas claimants in this alleged class. Texas's interest in limiting the application of its own laws will be defeated, and the interests of the home states of non-Texas claimants will be ignored. If the Full Faith and Credit Clause and comity among state courts are to have any meaning, they must preclude courts of other states from declaring that the law of Texas applies when the highest court of Texas says that it does not.

This case also raises increasingly important questions regarding the preclusive effect of issues resolved in denials of class certification. Unhappy with the decision of the Texas Supreme Court, plaintiffs' counsel simply hopped across the state line, asserting precisely the same claims on behalf of the exact same putative class in an unabashed attempt to take advantage of Oklahoma's greater hospitality to nationwide class actions. The fact that plaintiffs' counsel disagreed with the decision of the Texas Supreme Court decertifying the purported nationwide class and ruling that no single state's law could govern the claims of all alleged class members should not grant a license to disregard the Texas ruling and move the same alleged class to a more favorable forum. If such blatant forum-shopping is allowed to stand, then future plaintiffs confronted with an unfavorable final ruling in one state will be encouraged to simply move on to the next forum with the express goal of seeking a different result—precisely as occurred here. Absent review by this Court, plaintiffs' counsel effectively will have free rein to bring successive (and virtually identical) actions in as many jurisdictions as it takes to gain certification of their desired classes.

These concerns are not a hypothetical parade of horribles. Many courts already have been forced to address this problem, reaching conflicting and irreconcilable results. There is an urgent need to bring consistency to an issue of growing national significance.

Finally, this case raises important and recurring questions regarding the failure of the Oklahoma courts to abide by this

Court's decisions defining constitutional restrictions on the manner in which state courts may conduct the choice-of-law inquiry in multistate class actions. The Oklahoma Court of Civil Appeals here applied Texas law to the claims of all class members without considering whether Texas has a cognizable interest in the claims of each individual class member or whether a material conflict exists between Texas law and the laws of the other relevant jurisdictions. Instead, the Court of Civil Appeals *presumed* the existence of the class, and then considered whether Texas had an interest in the litigation as a whole.

The Court of Civil Appeals' choice-of-law inquiry thus employed precisely the "bootstrap" approach that this Court previously has declared deficient. This Court's decision in *Shutts* made clear that a significantly more thorough analysis is required before a single state's law may be applied to a multistate class action. Review by this Court is needed to vindicate petitioner's due process interest in not being arbitrarily subjected to the law of a state without a cognizable interest in the claims of most members of the purported class. Review also is needed to correct the recurring problem of state courts in Oklahoma and elsewhere employing such constitutionally-deficient choice-of-law inquiries to endorse expensive and unmanageable multistate class litigation.

## I. THE FAILURE OF THE OKLAHOMA COURT OF CIVIL APPEALS TO ABIDE BY THE TEXAS SUPREME COURT'S DECISION IN *LAPRAY* IS CONTRARY TO THE FULL FAITH AND CREDIT CLAUSE.

This case presents the question whether a state court, in conducting a choice-of-law inquiry, may refuse to follow the conclusion of the highest court of a sister state determining that state's interest in having its law govern a particular controversy. Although this Court has never addressed this precise issue, the guidance provided by the Court's previous

decisions makes clear that a state may not override another state's express conclusion that its own laws do not govern particular claims. Indeed, if the Full Faith and Credit Clause is to have any meaning at all, it must preclude a state from ignoring the decisions of the highest court of a sister state construing the scope and application of that state's own laws.

The well-established doctrine of comity between the states is predicated on the principle of reciprocity, and helps ensure that each state accords a proper respect to the laws and judgments of other states as coequal sovereigns. In certain circumstances, however, the respect due to the laws and judgments of a sister state is not merely a matter of comity, but rather a constitutional and statutory requirement under the Full Faith and Credit Clause and the federal statute implementing that Clause. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738. As this Court has explained, the Full Faith and Credit Clause, in certain respects, "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it." *Estin v. Estin*, 334 U.S. 541, 546 (1948) (citation omitted).

Although the Court at times has found that the Full Faith and Credit Clause plays only a limited role in regulating the interaction of the states, *see Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 495-96 (2003), the Court consistently has held that the Clause imposes definite limits on a state's choice-of-law analysis. *See, e.g.*, *Shutts*, 472 U.S. at 818-20; *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (plurality opinion). In fact, the Court has stated that the Full Faith and Credit Clause made conflicts of law principles "enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 n.1 (1988). The

decisions of this Court make clear that the Full Faith and Credit Clause imposes substantive restrictions on a state court's choice-of-law inquiry, compelling the forum to consider a state's interests in the conduct at issue before applying that state's law. *See Allstate*, 449 U.S. at 308.

Contrary to the Full Faith and Credit Clause, the Oklahoma Court of Civil Appeals failed to accord proper respect to the Texas Supreme Court's decision in *LaPray*. In decertifying the nationwide class in *LaPray*, the Texas Supreme Court concluded that Texas lacked a cognizable interest in the claims of non-Texas residents to support the application of Texas law to their warranty claims. App. 83a-85a. Under this Court's decision in *Shutts*, a single state's law may not be applied to the claims of all class members in a multistate class action unless that state has "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that choice of [that state's] law is not arbitrary or unfair." 472 U.S. at 821-22 (citation omitted). And as the *LaPray* court noted, this constitutional threshold parallels Texas's own statutory restriction limiting the application of Texas law to "transactions bearing an appropriate relation to this state." Tex. Bus. & Com. Code § 1.301(a). Considering both standards, the Texas Supreme Court found that the claims of non-Texas claimants fell short of both the statutory and due process thresholds. App. 83a-85a. The *LaPray* court concluded that "[t]he trial court abused its discretion, therefore, in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims." App. 85a.

*LaPray* thus provides a definitive statement regarding the proper reach of Texas law, establishing that—for both statutory and constitutional reasons—Texas law cannot govern warranty claims brought by non-Texas residents for products purchased and used outside of Texas. Fundamentally, the Texas Supreme Court concluded that Texas law cannot

provide a unifying basis for certifying a nationwide class in this case.

Under the Full Faith and Credit Clause and the decisions of this Court applying that provision, the Oklahoma courts were obliged to respect and abide by that determination, and thus should have deferred to Texas's stated conclusion that it lacked a cognizable interest in the claims of non-Texas residents. If a Texas statute by its express terms limited the application of the State's consumer protection laws to claims asserted by Texas residents only, there would be little doubt that the Full Faith and Credit Clause would preclude an Oklahoma court from disregarding that limitation and applying Texas law in any manner it saw fit.

The result should be no different simply because the Texas Supreme Court, rather than the Texas legislature, has announced the appropriate reach of Texas law. Rather, the decisions of the Texas Supreme Court –as the arbiter of the meaning of Texas law—should be accorded the same respect that would be given to a pronouncement from the Texas legislature regarding the scope of state law. *See Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (the command of the Full Faith and Credit Clause is "exacting" with respect to dispositions "rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment"). *See also Allstate*, 449 U.S. at 308 n.10 (plurality opinion). Accordingly, the Oklahoma courts were required to abide by the Texas Supreme Court's conclusion that Texas law cannot govern the claims of non-Texas plaintiffs.

In fact, given the circumstances here, the reasons for refusing to apply Texas law to the claims of non-Texas residents are even stronger than those found controlling in earlier cases. In *Shutts*, for instance, as explained in greater detail below, *see infra* Part III.A, the Court rejected the application of Kansas law to the claims of a multistate plaintiff class. 472 U.S. at 818-21. The Court ruled, contrary

to the assessment of the Kansas courts, that Kansas lacked cognizable "state interests" warranting the application of Kansas law to the claims of class members residing in other states. *Id.* at 818-19.

Here, the Oklahoma court did not have to conduct its own assessment of Texas's interest in the claims presented, as the Texas Supreme Court already had resolved that issue. *See* App. 82a-85a. Unlike the Kansas courts in *Shutts*, the Oklahoma Court of Civil Appeals knowingly refused to abide by the decision of the highest court of a sister state explicitly resolving the proper application of that state's law to *precisely the same claims* asserted on behalf of *precisely the same class*. Nowhere could the case be clearer for invalidating a court's choice-of-law analysis under the Full Faith and Credit Clause.

As this Court has made clear, although a misconstruction of another state's law is not enough to constitute a violation of the Full Faith and Credit Clause, a violation does occur where a state construes the law of another state in a manner that "contradict[s] law of the other State that is clearly established and that has been brought to the court's attention." *Sun Oil Co.*, 486 U.S. at 731. Such is the case here, where the Oklahoma courts were not determining Texas's interest on a blank slate. To the contrary, the Court of Civil Appeals was well aware that the Texas Supreme Court previously had construed the reach of Texas law in a contrary manner with respect to the very same class and the very same claims. Indeed, not only petitioner but the State of Texas itself as amicus curiae urged the Oklahoma Supreme Court to reverse the Court of Civil Appeals regarding the application of Texas law. Nevertheless, the Oklahoma Supreme Court denied review.

If the decision below is permitted to stand and Oklahoma is able to simply disregard the decisions of the Texas Supreme Court construing the proper reach of Texas law, then the Full Faith and Credit Clause effectively will be drained of any

meaning with respect to determinations of state law. Compaq will be forced to litigate this nationwide class action under Texas law despite the fact that Texas itself has affirmatively disclaimed a cognizable interest in having Texas law apply to the claims of Texas non-residents. Texas also will have lost the ability to limit the scope of its own laws, and the interests of other states in applying their laws to the claims of their residents will be disregarded. A single state will be permitted to make itself a magnet for nationwide class litigation on all kinds of claims. This Court's intervention is necessary to confirm that the Full Faith and Credit Clause requires state courts to accord appropriate deference to the decisions of sister states.

## II. THE OKLAHOMA COURT OF CIVIL APPEALS SHOULD HAVE ADHERED TO THE TEXAS SUPREME COURT'S CONCLUSION THAT A NATIONWIDE CLASS CANNOT BE MAINTAINED IN THIS CASE.

In the face of the Texas Supreme Court's decertification of a nationwide class, the decision of the Oklahoma Court of Civil Appeals is tantamount to a ruling that the class certification exercise is a one-way ratchet: representative plaintiffs can attempt any number of times to certify a nationwide class until they finally succeed in some state. No number of failures is preclusive; the first state court ruling in favor of certification of the proposed class governs. That is not, and should not be, the law.

Here, immediately after the Texas Supreme Court decertified the nationwide class in the Texas action, plaintiffs moved in Oklahoma to have the identical nationwide class certified, relying on the same evidentiary record developed in the Texas action. App. 34a. Courts would not tolerate such conduct by an individual plaintiff dissatisfied with a state court's procedural ruling. Such a plaintiff, having selected his forum, would not be permitted simply to step across state

lines and start over whenever something went wrong in the first action.[3] In this case, however, because the class ultimately was not certified in Texas, the Oklahoma Court of Civil Appeals evidently thought that the *LaPray* decision could not preclude new named plaintiffs from relitigating the class certification issue (as well as the choice of applicable law). This is a dangerous precedent that should not be left in place. Such "a fundamental departure from traditional rules of preclusion," *Kremer*, 456 U.S. at 485, would mean no limit to the number of times that plaintiffs could seek certification of huge multistate classes.

The issue, of course, is whether absent members of the putative nationwide class can be bound by issues resolved in the class certification decision even where those absent members have not been given notice and an opportunity to be heard. The decision not to certify a nationwide or multistate class does not resolve any claim on the merits. After the class certification ruling, every absent class member retains the very same claim he or she had before the proposed class was rejected or, as here, decertified. Absent class members remain free to pursue such claims in their own actions or in class litigation of more modest ambition.

This Court has held that "[t]he limits on a state court's power to develop estoppel rules reflect the general consensus in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not

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[3] *See, e.g., Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) ("In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum."); *Baker*, 522 U.S. at 233 ("For claim and issue preclusion (res judicata) purposes, . . . the judgment of the rendering State gains nationwide force."); *see also San Remo Hotel, L.P. v. County of San Francisco*, 545 U.S. 323, 345 (2005) ("the weighty interests in finality and comity trump the interest in giving losing [state court] litigants access to an additional appellate tribunal" through the federal courts).

designated as a party or to which he has not been made a party by service of process." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (quotation and citation omitted). Despite this general proposition, however, this Court has recognized that "these principles do not always require one to have been a party to a judgment in order to be bound by it." *Id.* Most notably, this Court has "recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, had his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989).

This is precisely the case where, as here, a named plaintiff seeks to assert claims on behalf of a specifically-defined class. In fact, this Court has acknowledged that members of a class may be bound by prior proceedings so long as the interests of the entire class were uniform and absent class members were adequately represented by the named parties. *See, e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 42 (1940); *Richards*, 517 U.S. at 800-01.

This Court has not decided, however, whether members of a putative class are bound by a prior *denial* of class certification, at least with respect to issues resolved in the context of (and necessary to) that denial. The question is whether unnamed class members can be bound by the prior determinations that resulted in the denial of class certification where they are adequately represented by (and their interests are identical to) the named plaintiffs. The Court has expressly left this issue for later resolution. *See, e.g.*, *Richards*, 517 U.S. at 801 (recognizing that "*Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice"). The continued uncertainty in this area has engendered a sharp conflict among the lower courts that have addressed this increasingly significant question.

For instance, the Seventh Circuit has concluded that absent members of a putative class *are* bound by prior denials of

class certification. *See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 333 F.3d 763, 768 (7th Cir. 2003) ("Our prior judgment [denying class certification] is binding *in personam* with respect to the unnamed class members."). After the court of appeals reversed the district court's certification of a nationwide class, plaintiffs' counsel "decided to try again," filing suits in fifteen states seeking certification of the same nationwide class, apparently "adopt[ing] a strategy of filing [the same complaint] in as many courts as necessary until a nationwide class comes into being and persists." *Id.* at 765, 766.

Expressing its disapproval of such an approach, the court explained that, if judicial rejection of a nationwide class does not preclude future attempts to certify the same class for the same claims, then "plaintiffs can roll the dice as many times as they please."[4] *Id.* at 767. Under such a regime, any nationwide class certification will control (because it will subsume all other suits), but a no-certification decision will have no enduring effect. The court rejected plaintiffs' efforts to create "an asymmetric system in which class counsel can win but never lose." *Id.* The Seventh Circuit concluded that the prior denial of class certification should have a binding and preclusive effect on absent members of the putative class as long as those absent members were adequately represented on the class certification issue by the named plaintiffs and class counsel. *Id.* at 768-69. Here, the adequacy of representation is not an issue. The named plaintiffs in Oklahoma were represented by the same counsel relying on the same

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[4] As one leading treatise remarked, the *Bridgestone/Firetsone* decision reflects the "desire to prevent [the] descent of class-action litigation to the level of the most supine court . . . ." 18A C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 4455, at 458 (2007 Pocket Part).

evidentiary record and advancing the same arguments as were used previously in the Texas case.[5]

Other courts, however, have refused to preclude absent class members from seeking to relitigate issues resolved in prior denials of class certification. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 145-46 (3d Cir. 1998) (denial of certification "lacks sufficient finality to be entitled to preclusive effect"); *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176, 179 (5th Cir. 1996) ("the denial of class certification . . . lacks sufficient finality to be entitled to preclusive effect while the underlying litigation remains pending").[6] *See also In re Cordis Corp. Pacemaker Prod. Liab. Litig.*, Nos. C-3-86-543, C-3-90-374, MDL No. 850, 1993 U.S. Dist. LEXIS 21296, at

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[5] There is no serious question that Texas itself would preclude absent class members from relitigating any issues actually adjudicated in *LaPray*, including in particular the ruling that Texas law cannot be applied to the entire nationwide class. Under Texas preclusion rules, non-parties that are deemed in privity with the parties to an action are precluded from relitigating any issues resolved in that action. *See Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652-53 (Tex. 1996) ("Res judicata precludes . . . a second suit arising out of the same subject matter of an earlier suit by those in privity with the parties to the original suit." (citations omitted)). Non-parties are deemed in privity when their "interests are represented by [a] party" to the action, which they plainly were in this case. *Getty Oil Co. v. Insurance Co. of N. Am.*, 845 S.W.2d 794, 800 (Tex. 1992).

In certifying the nationwide class, the Texas trial court was required to determine under Texas Rule 42(a) that the named plaintiffs adequately represented the interests of the entire class. Moreover, Texas law requires that the trial court "must assume its role as guardian of the class not only in approving class settlements, but also in deciding whether to certify a class in the first place." *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex. 1996).

[6] The Seventh Circuit in *Bridgestone/Firestone* addressed the finality issue and concluded that the prior rejection of a nationwide class was "sufficiently firm" to be given preclusive effect. 333 F.3d at 767.

*12-13 (S.D. Ohio Dec. 8, 1993) (issue preclusion does not apply where party seeking certification in subsequent action was neither identical to nor in privity with named party in prior unsuccessful certification). On various grounds, these courts held that a rejection of a proposed nationwide class does not necessarily foreclose unnamed claimants from trying again in another jurisdiction to certify the same class. The Oklahoma Court of Civil Appeals evidently agreed with this latter approach.

As the present case shows, this Court's intervention is needed to resolve this conflict and to prevent a further proliferation of cases in which multiple requests for certification of a nationwide class are litigated until one is granted. Denying preclusive effect to a prior denial of class certification simply encourages plaintiffs and their counsel to bring successive (and virtually identical) motions for class certification in as many jurisdictions as it takes to finally gain certification of the proposed class. Such an "asymmetric system" should not be permitted. Preclusion is appropriate in these circumstances because it will "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). As the Texas Supreme Court has written: "There is something incongruous and out of keeping with the concept of orderly processes to tolerate a situation wherein solemn court decrees may be flouted by playing hop-skip with state boundaries." *McElreath v. McElreath*, 345 S.W.2d 722, 724 (Tex. 1961).

## III. THE CHOICE-OF-LAW INQUIRY CONDUCTED BY THE OKLAHOMA COURT OF CIVIL APPEALS FELL SHORT OF THE CONSTITUTIONAL REQUIREMENTS SET FORTH IN *SHUTTS*.

This Court's intervention also is needed to vindicate (a) Petitioner's due process interest in not being arbitrarily sub-

jected to the law of a state without a cognizable interest in the claims of most members of the class, and (b) the constitutionally-significant interests of other jurisdictions in having their law applied in appropriate circumstances (*e.g.*, to the claims of in-state residents). In certifying the nationwide class here, the Oklahoma Court of Civil Appeals determined that Texas law should be applied to the claims of all putative class members. The court reached that conclusion without inquiring into whether Texas has a cognizable interest in the claims of *each* member of the putative class—and, indeed, despite Texas's stated lack of interest in such claims. The court also failed to consider whether material conflicts exist between Texas law and the laws of other potentially interested jurisdictions. The court's choice-of-law analysis thus fell short of the constitutional restrictions recognized by this Court in *Shutts*.

### A. The Oklahoma Court of Civil Appeals' Choice-of-Law Inquiry Failed to Consider Whether Texas Has a Cognizable Interest in Having Its Law Govern the Claims of Each Class Member.

Although states generally are permitted to adopt the choice-of-law rules they deem appropriate, this Court has made clear that choice-of-law inquiries are constrained by "federal constitutional limitations." *Allstate*, 449 U.S. at 307. In *Shutts*, for instance, the Court held that, although a forum state has some freedom to select among the potentially applicable rules of decision, the Due Process and Full Faith and Credit Clauses require that the selection be made from among bodies of law bearing a sufficient relationship to the claims at issue. 472 U.S. at 818. In this way, the Constitution imposes substantive "restrictions" on the manner in which a state may conduct its choice-of-law inquiry in a multistate class action. *Id.*

In *Shutts*, the Court considered the claims of a multistate class of plaintiffs who brought suit in Kansas state court

against an out-of-state corporation. The Kansas state court agreed with plaintiffs that Kansas law should govern the claims of the entire class, citing the plaintiffs' choice of Kansas as the forum and Kansas's preference for applying its own law in its own courts absent exceptional circumstances. 472 U.S. at 803. This Court reversed, holding that Kansas could not constitutionally apply its own law to the claims of the entire class. *Id.* at 818-20. Even though Kansas could exercise personal jurisdiction over both the defendant and those members of the plaintiff class who did not choose to opt out after being given an opportunity to do so, the Court held that Kansas could not "bootstrap" that personal jurisdiction into a justification for applying Kansas law to claims in which Kansas otherwise would not have a cognizable interest. *Id.* at 821. The Court ruled that, "[g]iven Kansas' lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, . . . application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits." *Id.* at 822.

*Shutts* thus established that the forum state may not apply the law of any single state at a classwide level where that state lacks sufficient contact with the claims of *each individual class member* such that the state has an interest in having its law govern the conduct at issue. It is not enough that the litigation or the plaintiff class taken as a whole has significant contacts with a single state. Rather, a state must have a "significant contact or significant aggregation of contacts to the claims asserted by *each member of the plaintiff class*, contacts creating state interests, in order to ensure that the choice of [that state's] law is not arbitrary or unfair." 472 U.S. at 821-22 (quotations omitted) (emphasis added). As the Court explained, a "more thoroughgoing treatment" is required to demonstrate that a single state has an interest in each plaintiff's claims that "support[s] the application of only [one state's] law to all these claims." *Id.* at 818, 820. Thus, in conducting a choice-of-law analysis, the forum court must

consider each state's interest in the conduct at issue as to the claim of each individual member of the putative class, not as to the litigation as a whole.

Contrary to this requirement, the Oklahoma Court of Civil Appeals considered only the class as a whole in ruling that Texas law should apply to the claims of all members of the nationwide class, abandoning any pretense of an individualized assessment into whether Texas had a sufficient nexus with the claims of "each member of the plaintiff class." In justifying its aggregate approach, the court stated that "'[t]he needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions.'" App. 13a (quoting *Ysbrand*, 81 P.3d at 626).

Oklahoma's perception of "the needs of the interstate system" differs from that of this Court and should be rejected.[7] According to this Court, the needs of our system of constitutional federalism require fidelity to the interests of other states as well as the forum state or the state in which a defendant has its headquarters. Thus, as *Shutts* made clear, a state may not dilute the requisite constitutional inquiry merely to facilitate class treatment of a set of claims. 472 U.S. at 821 (a state's choice-of-law calculus may not be "altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the

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[7] Oklahoma's view also differs from that of Congress, which, in enacting the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), found that "Federal court consideration of interstate cases of national importance under diversity jurisdiction" was necessary to remedy "[a]buses in class actions [that] undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution . . . ." *Id.* at 5.

large number of transactions which the State proposes to adjudicate and which have little connection with the forum"). To the contrary, "constitutional limitations" must be respected even in a putative nationwide class action, and thus a state "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirements that there be a 'common question of law.'" *Id.* In other words, due process requirements cannot be subordinated to the forum state's desire for uniformity of results or the perceived efficiency of class treatment. Neither interest provides a sufficient basis for overcoming the Constitution's prohibition against applying a state's law to conduct that has "little or no relationship" to that state. *Id.* As the Texas Supreme Court has put it: "Inescapably individual differences cannot be concealed in a throng." *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693 (Tex. 2002).

### B. The Oklahoma Court of Civil Appeals Improperly Applied Texas Law to the Entire Nationwide Class Despite Material Conflicts Between Texas Law and the Laws of Other Interested Jurisdictions.

In addition, the Oklahoma courts' choice-of-law inquiry failed to assess potential conflicts between Texas law and the law of other interested jurisdictions. To apply a single state's law to a multistate class action, the Constitution requires that a state's choice-of-law inquiry identify and evaluate any material conflicts between the law being applied and the laws of other jurisdictions with potential contacts with plaintiffs' claims. *Shutts*, 472 U.S. at 817-18. In *Shutts*, for instance, the Court concluded that, because a material conflict existed between the substantive law of Kansas (the law applied to the class claims) and that of Texas and Oklahoma (two other possible sources of law), the application of Kansas law to a particular claim absent a cognizable Kansas interest in that claim would violate the

parties' due process rights and be inconsistent with the Full Faith and Credit Clause. *Id.* at 817-21.

Although adjudicating claims involving the application of various sources of law may increase the burden on courts and litigants alike, such differences in law "are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court." *In re Bridgestone/ Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (citing *BMW v. Gore*, 517 U.S. 559, 568-73 (1996)), *cert. denied*, 537 U.S. 1105 (2003). Indeed, "[t]empting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected." *Id.* at 1021 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997)).

The failure by the Oklahoma courts to abide by this rule and conduct a state-by-state conflicts analysis resulted in a violation of Compaq's due process rights. For, in conducting such an individualized choice-of-law inquiry, the Texas Supreme Court found that significant material conflicts exist among the various state laws that could be applied. App. 71a-83a. In particular, the Texas Supreme Court identified and highlighted significant conflicts regarding the relevant standards for warranty notice and reliance requirements, and also the remedies available to plaintiffs. *Id.*

These differences in state law do not relate merely to inconsequential issues that would render them "false conflicts." *See Shutts*, 472 U.S. at 818. To the contrary, in many jurisdictions, it is possible that Compaq would not be subject to any liability at all. *See, e.g.*, App. 73a, 82a. For instance, in discussing the differences in warranty notice required by the various jurisdictions, the Texas Supreme Court stated:

> These differences are significant. In this case, the parties dispute whether the notice requirement has been satisfied. Compaq denies that it received pre-suit notice from most of the putative class members; conversely, one of the named plaintiffs claims to have met the notice

> prerequisite by giving Compaq written notice on behalf of the entire uncertified class. *This issue may be critical.* If, for example, a putative class member lived in a state that required notice only to the immediate seller (and not the manufacturer), and that class member notified the immediate seller of the product defect, that class member should be deemed to have satisfied the notice requirement even if the manufacturer was not specifically advised of the claim. On the other hand, if that class member lived in a state that required notice to the manufacturer, failure to give that notice *could bar the claim.*

App. 73a (emphasis added). Oklahoma's application of Texas law thus may subject Compaq to liability on claims that potentially are barred in certain jurisdictions (including jurisdictions that, unlike Texas, have an interest in the claims of individual class members). Such an outcome is inconsistent with the due process requirements expounded by this Court.[8]

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[8] It is no answer to say that application of Texas law could not offend Compaq's due process interests because Compaq is headquartered in Texas and thus should have anticipated being subjected to Texas law. Even though Compaq is headquartered in Texas, it would be unreasonable to expect that Texas law would govern every warranty claim around the nation, regardless of how little interest Texas may have in the claim of a non-Texas resident. Indeed, a review of Texas law would have suggested that Texas law would not govern in the circumstances presented here because the Texas statute expressly limits application of Texas law to "transactions bearing an appropriate relation to this state," Tex. Bus. & Com. Code § 1.301(a), and the Texas Supreme Court has made clear that Texas "does not apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged against the defendant." *Schein*, 102 S.W.3d at 698. The Texas Supreme Court's decision in *LaPray* confirms this point. Thus, Compaq should not be charged with any expectation that Texas law would govern every warranty claim by anyone in the United States. *See Shutts*, 472 U.S. at 822 ("When considering fairness in this context, an important element is the expectation of the parties."); *Allstate*, 499 U.S. at 327 (Stevens, J., concurring) ("A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair.").

Although the decisions of this Court have addressed only a state's decision to apply its own law to an entire nationwide class, the conclusion should be no different where a state applies the law of another state. The due process restrictions recognized by this Court in *Shutts* are intended to ensure that plaintiffs cannot simply seek out the forum with the most favorable laws, regardless of that jurisdiction's relationship to the case or interest in adjudicating the action. This is true whether plaintiffs are seeking out a favorable forum based on the state's substantive laws, or whether a forum is considered favorable because it adopts class-friendly choice-of-law rules. In either case, a state runs afoul of the Constitution when it applies the law of a single state—whether its own law or the law of another state—solely to homogenize the plaintiffs' claims to make them suitable for class treatment. As this case demonstrates, even the application of another state's law can create exactly the sort of unfair and arbitrary result that *Shutts* forbids. If anything, the constitutional inquiry should be more stringent in such circumstances because of the increased risk that the forum state will misapply another state's law.

## IV. THE ISSUES PRESENTED HERE RECUR FREQUENTLY IN OKLAHOMA AND OTHER JURISDICTIONS.

Far from being an isolated problem, the issue presented here arises with troubling frequency, both in Oklahoma state courts and other jurisdictions as well. Just five years ago, the Seventh Circuit wrote that the notion that "one state's law would apply to claims by consumers throughout the country . . . is a novelty, and, if followed, would be of considerable import to other suits." *Bridgestone/Firestone*, 288 F.3d at 1016. Such an outcome is no longer a novelty, especially not in Oklahoma.

In fact, given Oklahoma's choice-of-law rules, "the invitation to forum shopping" against which this Court has warned is quickly becoming "irresistible." *Shutts*, 472 U.S. at

820 (quotation and citation omitted). Glossing over this Court's decision in *Shutts*, Oklahoma courts repeatedly have certified nationwide classes applying the law of a single state in a manner that raises the same constitutional concerns presented here. *See, e.g., Ysbrand*, 81 P.3d at 625-27; *General Motors Corp. v. Ford*, No. IN-100474 (Okla. Civ. App. Dec. 3, 2004), *cert. denied*, 546 U.S. 935 (2005). The application of Texas law in this case thus represents a growing trend that is a direct result of the willingness of Oklahoma courts to conduct choice-of-law inquiries that dilute the due process protections established in *Shutts* in order to facilitate nationwide class actions.

Other states also have implemented similar choice-of-law rules that expressly facilitate the certification of a nationwide class by applying the law of defendant's principal place of business to all claims. *See, e.g., Martin v. Heinold Commodities, Inc.*, 510 N.E.2d 840, 846-47 (Ill. 1987). As one commentator recently observed:

> [E]fforts to apply a single state's law to the claims of a nationwide class have not ended with *Shutts*. In recent years, a small number of courts have certified nationwide classes in consumer litigation based upon the choice to apply a single body of law to the class—this time, not necessarily forum law but, rather, the law of the defendant's principal place of business.

Richard A. Nagareda, *Bootstrapping In Choice Of Law After The Class Action Fairness Act*, 74 UMKC L. Rev. 661, 670 (2006). The efforts to certify nationwide classes based on application of the law of the defendant's principal place of business "rest upon an underlying shift in the way that class counsel characterize the class members' claims." *Id.* at 671. As this case amply demonstrates, "[t]he shift consists of casting in a different guise—whether as contractual claims for breach of warranty or as fraud claims under state consumer protection law—matters that seemingly would sound more readily in tort law concerning product liability. A major part

of the explanation for this shift in focus lies in the general hostility of courts toward nationwide product liability classes on choice-of-law grounds." *Id.* Absent this Court's intervention, states adopting such lenient choice-of-law rules—as Oklahoma and Illinois already have done—quickly will become magnets for putative plaintiff classes and their counsel seeking to capitalize on this shift in focus.

The enactment of the Class Action Fairness Act of 2005 ("CAFA"), offers no solution to this problem.[9] Even after CAFA, a federal court sitting in diversity in such a case is required to use the choice-of-law principles of the state in which the court sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Under *Klaxon*, a federal district court sitting in Oklahoma would be obliged to resolve the choice-of-law question in a nationwide breach-of-warranty class action in the same manner as Oklahoma state courts, that is, in the manner prescribed by *Ysbrand*. Federal courts sitting in states like Oklahoma and Illinois thus will be forced repeatedly to confront this issue in the future. Review by this Court is needed to arrest this disturbing trend.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] The Senate Judiciary Committee specifically cited *Ysbrand* as an example of "judicial usurpation" and criticized the Oklahoma Supreme Court for "decid[ing] effectively to override whatever policy determinations another state's legislature or courts may have made on warranty or product liability policy to protect their own residents." S. Rep. No. 109-14, at 26, 25 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 26, 25.

Respectfully submitted,

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July 25, 2007

# APPENDIX

**APPENDIX A**

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[Filed MAR. 26, 2007]

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THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * * *

102,693 Stephen Grider and Beverly L. Grider, individually and on behalf of those similarly situated v. Compaq Computer Corporation

Petition for certiorari is denied.

CONCUR: Edmondson, V.C.J., Lavender, Hargrave, Opala, Kauger, Watt, Taylor, Colbert, JJ.

DISSENT: Winchester, C.J.

* * * *

/s/ James R. Winchester
CHIEF JUSTICE

**APPENDIX B**

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE
STATE OF OKLAHOMA
DIVISION III

[Filed OCT. 13, 2006]

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Case No. 102,693

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STEPHEN GRIDER and BEVERLY L. GRIDER,
Individually and on behalf of those similarly situated,
*Plaintiffs/Appellees*,

vs.

COMPAQ COMPUTER CORPORATION,
*Defendant/Appellant*.

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APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

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HONORABLE TOM A. LUCAS, TRIAL JUDGE

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AFFIRMED

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John C. Niemeyer,
Linda G. Alexander,
N. Frank Austin,
Harris A. Phillips,
NIEMEYER, ALEXANDER,
AUSTIN & PHILLIPS, P.C.,
Oklahoma City, Oklahoma, For Plaintiffs/Appellees,

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CROWE & DUNLEVY, P.C.,
Norman, Oklahoma,

and

Jimmy Goodman,
Harvey Ellis,
CROWE & DUNLEVY, P.C.,
Oklahoma City, Oklahoma,

and

Michael J. Holtson,
John F. Schultz,
MORGAN, LEWIS & BOCKIUS LLP,
Philadelphia, Pennsylvania, For Defendant/Appellant.

* * * *

OPINION

ADAMS, *Judge*:

Compaq Computer Corporation (Compaq) appeals an order granting class certification, arguing the trial court erred in its choice of the law applicable to the claims and in concluding class certification was appropriate. Because we conclude the trial court properly applied choice of law rules to find that Texas law applies to the breach of warranty claims asserted in this proceeding and did not otherwise abuse its discretion in certifying the class, we affirm the trial court's order.

Certification Proceedings

On June 4, 2003, Stephen Grider and Beverly L. Grider (Plaintiffs) sued Compaq, claiming that it had breached its express warranty to purchasers of its products by delivering desktop and laptop computers[1] with a defective floppy disc

[1] Specifically, Plaintiffs sought to certify a class of purchasers of Presario desktop computers bearing model numbers 2266, 2275, 2281, 2285V, 2286, 2412ES, 2416ES, 5070, 5184, 5185, 5301, 5304, 5304b, 5340,

controller chip (FDC)[2] in an SIS/ITE chip and proposing that they act as representatives of a class of other similarly situated computer purchasers. They claim the allegedly defective FDC was found in 35 computer models sold after 1995[3] and caused data to be lost or corrupted as well as system failures and other problems. According to Plaintiffs, the defective FDCs failed to meet specifications and the affected computer models were covered by Compaq's express warranty. They claim Compaq posted at least two versions of an ineffective software "patch" that purchasers could download, sometimes referred to as SoftPaq 13456, but that the "patch" itself caused further data corruption and degrading of computer performance.

Plaintiffs claimed Compaq breached its express warranty and committed a breach of contract by refusing to do a "true repair or replacement" of the defective parts or to issue an "unconditional refund" under its warranty. As a result, Plaintiffs sought a declaratory judgment concerning the express

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5345, 5360, 5365, 5410, 5440, 5441, 5451, 5452, 5460, 5461, 5465, and 5710 as well as purchasers of Tiger laptop computers bearing model numbers 17XL260, 17XL261, 17XL262, 17XL264, 17XL265, 17XL266, 17XL274, 17XL275, and 1700T[CTO].

[2] Plaintiffs allege that the defect causes the FDC to fail to detect or report underrun and overrun conditions on the last byte of a floppy disk read or write operation with the result that the machine will: "freeze up" or "crash" or "lock up," fail to retrieve files, open with garbled data or "garbage," give "file corrupted" or similar prompts, and deny access to files. In an affidavit Plaintiff Beverly L. Grider claimed she experienced all these problems and that their occurrence was "regular and frequent" and "could not be characterized as occasional." She also reported such problems in deposition testimony. According to her affidavit, she eventually contacted Compaq and was allegedly told she "had no claim under the warranty" and she could pay a fee for further assistance, or she could replace the machine at her own cost. Plaintiff Stephen Grider also testified at deposition to having experienced the problems with the computer.

[3] The Tiger laptop model "17XL266" is listed twice in the class definition. Therefore, the number of affected models appears to actually be 35.

warranty terms and whether a breach of those terms had occurred or, alternatively, a declaratory judgment for specific performance of the express warranty. They also asked for an order granting them damages, appropriate equitable relief, costs and attorney fees.

Plaintiffs filed a separate motion seeking class certification on August 6, 2003. The trial judge set a schedule for the parties to submit briefs on of the issue of choice of law on July 28, 2004. Following consideration of the briefs and hearing on Plaintiffs' motion for class certification, the motion was granted.

In a September 23, 2005 Order (Certification Order), the trial court found that Compaq had sold more than 1.7 million computers of the allegedly defective models with the same written express warranty warranting the machines were free of defects in materials and workmanship, and that Plaintiffs had purchased a computer with that written express warranty. The Certification Order recites Plaintiffs' allegations regarding the FDC deficiencies in the computers, and Compaq's refusal to honor the express warranty provided with its computers.

The Certification Order cites and incorporates by reference 12 O.S. 2001 § 2023, and concludes that the class "sought to be certified is so numerous that joinder of all members is impractical," and that questions of law and fact common to the class include "allegations of a common defect, common warranty, and common relief" existed. The Certification Order also concludes that Plaintiffs' claims and defenses were typical of those of the class, they would "fairly and adequately protect the interest of the class," and that separate actions by members of the class would pose "a substantial risk of inconsistent or varying adjudications" which would "run a substantial risk of adjudications with respect to individual members of the class which as a practical matter

[would] be dispositve [sic] of the interest of other members of the class not parties to the separate action."

Further, the questions of law and fact common to the members of the class were found to predominate over questions applicable to individual class members. The trial court found that, after consideration of various interests and potential difficulties, "a class action is superior to other available methods for a fair and efficient adjudication of the controversy." This appeal followed.

Standard of Review

An order of the trial court certifying a class is reviewed for abuse of discretion. We engage in *de novo* review to determine if the record supports a conclusion that the prerequisites of a class action are met and the correct legal standards were applied. *Scoufos v. State Farm Fire and Casualty Co.*, 2001 OK 113, 41 P.3d 366. The claim is reviewed solely to determine if the trial court correctly decided a question of law in certifying the class.

We may look to federal authorities for guidance regarding the rationale behind Oklahoma's class action scheme because that scheme closely parallels the one provided in the Federal Rules of Civil Procedure. *Shores v. First City Bank Corp.*, 1984 OK 67, 689 P.2d 299. An abuse of discretion occurs when a court has based its decision on an erroneous conclusion of law or the record does not support the ruling, and, as noted in *KMC Leasing, Inc. v. Rockwell-Standard Corp.*, 2000 OK 51, ¶9, 9 P.3d 683,688, quoting *Boughton v. Cotter Corporation*, 65 F.3d 823, 826 (10th Cir. (Colo.) 1995):

> The discretion granted to the trial court on the certification issue leaves the decision as to what method of trial is most efficient primarily to the court that is in the best position to determine the facts of the case, to appreciate the consequences of alternative methods of resolving the issues of the case and that is in the best

position to select the most efficient method for their resolution.

The parties seeking certification have the burden of proving each of the requisite elements for a class action. *Davoll v. Webb*, 160 F.R.D. 142, 143 (D.Colo.1995) *aff'd. by* 194 F.3d 1116 (10th Cir. (Colo.) 1999). "The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. (N.M.) 1982).

The Class Certification

The prerequisites for a class action under Oklahoma law are set forth in 12 O.S.2001 § 2023(A) as allowing one or more members of a class to sue or be sued as representative parties on behalf of a class only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

In addition, after meeting these prerequisites, it also must be shown that:

1. The prosecution of separate actions by or against individual members of the class would create a risk of:
   a. inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

b. adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

   a. the interest of members of the class in individually controlling the prosecution or defense of separate actions,

   b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class,

   c. the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and

   d. the difficulties likely to be encountered in the management of a class action.

12 O.S.2001 § 2023(B).

Class actions are a procedural device permitting plaintiffs to consider lawsuits vindicating their rights where, without this device, it would not be "economically feasible to obtain relief

within the traditional framework of a multiplicity of small individual suits for damages" leaving aggrieved persons "without any effective redress." *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339, 100 S.Ct. 1166, 1174 (1980).

As noted in *Scoufos*, although the merits of the claim are not considered, "determining whether the trial court applied the correct legal standards when it assessed § 2023's commonality, predominance and typicality requirements for class certification necessitates identification and review of the core liability issues which the class asserts." 2001 OK 113, ¶1, 41 P.3d at 367. A party seeking class certification must show that the proposed class meets all four prerequisites of § 2023(A) and one of the requirements set forth in § 2023(B). We review the record to determine if the trial court abused its discretion by certifying a class which failed to meet the requisite criteria.

## ANALYSIS

The issue for consideration is whether the trial court abused its discretion in granting Plaintiffs' motion to certify a class regarding their claim that Compaq has breached its warranty for the models of computers at issue. Because the proposed class includes potential members in several states, a consideration preliminary to and a part of that determination by the trial court was ascertaining what substantive law is applicable to the claims of the proposed class.

### Choice of Law

Compaq argues the trial court erred in determining that the law of Texas will apply to the claims of the class members. The Certification Order makes no specific mention of choice of law, but it does recite that questions of law or fact common to the class members predominate over questions of law affecting individual class members and that "a class action is

superior to other available methods for a fair and efficient adjudication of the controversy."

The trial court's choice of law findings, the basis of Compaq's appeal, are contained in an October 26, 2004 Order Declaring Choice of Law (October Order). The October Order states claims of the parties regarding the Plaintiffs' warranty action, including that Compaq claimed the Texas Supreme Court had "ruled that Texas is not the proper forum for a class action on breach of this warranty," that state laws conflicted, and that Oklahoma had the most significant relationship to the cause of action.

The trial court found that computer parts had been manufactured and assembled in foreign countries but that "[a]ll major decisions regarding manufacture, specification, testing, acceptance, distribution, and warranties of the parts and product herein under consideration are made in Texas at [Compaq's] headquarters/home office." The trial court further found that the decisions to address the claim of a defective part and to honor or decline warranty coverage were made in Texas, as were teams for testing, chip selection, chip purchase decisions, design, evaluation and technical aspects of the computers. The October Order states that the trial court finds that the decision whether to ship the computers or not even after litigation relating to the computers was filed was made in Texas and the "apparatus for handling consumer warranty complaints" was centralized there.

In the October Order the trial court notes that Oklahoma has adopted the "most significant relationship" test for choice of law involving Uniform Commercial Code warranty claims, citing *Ysbrand v. DaimlerChrylser Corporation*, 2003 OK 17, 81 P.3d 618, *cert. denied*, 542 U.S. 937, 124 S.Ct. 2907 (2004), and concluded that "the appropriate choice of law is a substantive law of the state most directly connected to the parties and the transactions." Noting *Collins Radio Company of Dallas, Texas v. Bell*, 1980 OK CIV APP 57, 623 P.2d

1039, and the application of the test in Restatement (2nd) of the Law of Conflicts, Section 188(2) listing "relationships to be evaluated, including the place of contract, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties," the trial court concluded due process would not be violated by applying Oklahoma choice of law rules.

The October Order also states that if one "does not apply Texas law to a Texas UCC warranty, a manufacturer cannot know or determine what their warranty means or how it will be applied." The trial court also noted that "Section 191 of the Restatement provides that a contract for the sale of goods is governed by the law of the place of delivery unless another state has a more significant relationship."

Compaq argues the trial court erred in "certifying a nationwide class based upon the incorrect conclusion that Texas law should govern the claims of non-Texas residents" because it "misunderstood" *Ysbrand*, as establishing "a *per se* rule requiring application of the law of the state of the defendant's principal place of business to all breach of warranty claims." According to Compaq, the trial court's "wooden reading" of *Ysbrand* led it to ignore the decision of the Texas Supreme Court in *Compaq Computer Corporation v. Lapray*, 135 S.W.3d 657 (Tex. 2004), which it characterizes as holding that "Texas does *not* have any interest in having its warranty laws applied to out-of-state residents." (Emphasis in original.) We disagree with this assessment of what occurred in *Lapray*.

Compaq argues that the Court in *Lapray* concluded that "Compaq's presence in Texas was not sufficient to give Texas the greatest interest in the claims of non-Texas residents." This is too broad a reading of the decision. The Court in *Lapray* did not find Texas had no interest in having its law applied. The Court faulted the lower courts for "failing to conduct a state-by-state analysis of the questions of law

presented," 135 S.W.3d at 673, and having found conflicts in law which it deemed substantial, the Court rejected "the application of Texas law on the basis that the law of all jurisdictions is identical." 135 S.W.3d at 680. The Court then concluded that "while Texas law will apply to claims by most of those who bought computers in this state, the class representatives *have failed to demonstrate* it will apply to the claims of out-of-state class members." (Citation omitted, emphasis added.) 135 S.W.3d at 681.

Far from announcing a broad rule regarding the application of Texas law *per se*, the Court in *Lapray,* having conducted an analysis *of the record before it*, concluded that the plaintiffs there had not provided sufficient information and analysis regarding state policies and laws to find that Texas had the requisite interest and that the predominance requirement for class certification under state rules was not shown to have been satisfied. The opinion does not find Texas lacks interest, only that the plaintiffs failed to prove that Texas had a superior interest based on the record presented. Consequently, we do not consider *Lapray* as having the definitive qualities attributed to it by Compaq. We analyze this record solely to determine if the trial court abused its discretion as to Plaintiffs' claims when applying the legal analysis set forth in *Ysbrand.*

Compaq also argues, under its view that *"Lapray* is an unambiguous statement from the highest court in Texas," that comity requires that Texas law not be applied. However, though denying that it is doing so, its comity argument essentially claims Oklahoma must abandon its own procedural law when assessing the appropriate choice of law in matters involving multi-state actions. We will not do so. Comity is a principle useful "to resolve certain multistate situations," and it is the beginning of analysis, not the end. *Beard v. Viene*, 1992 OK 28, ¶8, 826 P.2d 990, 995. In accord with our assessment of *Lapray*, the principle of comity does not warrant the conclusions and result urged by Compaq.

We are especially persuaded that this analysis must occur given *Ysbrand*'s choice of law analysis that the most significant relationship test applies to warranty claims in a sale of goods. Noting that the Uniform Commercial Code (UCC) applied to sales of goods, the Court stated that "[t]he UCC warranties are not something which is negotiated" and that therefore "the relative interest of each buyer's home state in applying its version of the UCC is more or less equal." *Ysbrand*, 2003 OK 17, ¶15, 81 P.3d at 625.[4] We are bound by this analysis.

As in *Ysbrand*, there was no negotiation of the warranty by the buyers of these computers—all were covered by provisions in printed materials, the contents of which were determined by Compaq. There is no claim that warranty provisions varied from computer model to computer model in the class. As in *Ysbrand*, the question becomes whether the relationship of the states where the computers were purchased is more significant to the parties and the litigation than that of the principal place of business of the seller. In view of the standardization language of the warranty here, the analysis in *Ysbrand*, 2003 OK 17, ¶16, 81 P.3d at 626, used when finding that Michigan had the most significant relationship and its law should apply to the litigation is also relevant here:

> The needs of the interstate system and the basic policies of predictability and uniformity of result require that the issue of product defect be determined in one forum with one result rather than in 51 jurisdictions with the very real possibility of conflicting decisions. While the interest of each home state in applying its local law is significant, Michigan's interest in the conduct of its manufacturer, and thus its connection to the warranty

[4] Considering this assessment by the Oklahoma Supreme Court, we must decline to adopt Compaq's argument that class certification should not stand because individual issues predominate due to the need to apply the warranty laws of 51 jurisdictions.

> issues, is greater. Michigan law applies. It should be noted that this conclusion is consistent with the constitutional imperative that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818, [105 S.Ct. 2965, 86 L.Ed.2d 628] (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313, [101 S.Ct. 633, 66 L.Ed.2d 521] (1981)).

The October Order finds that all major decisions regarding warranty contents, manufacture, design, specifications, testing, acceptance, distribution, shipment, and decisions to honor or decline warranty coverage occurred in Compaq's Texas headquarters or home office. In other words, the record shows that most important events affecting Compaq's course of conduct which resulted in the delivery to consumers of computers with an allegedly defective FDC occurred in Texas. In light of these factual findings and in view of the above applicable analysis, we must conclude that the trial court did not err when applying the most significant relationship test and reject Compaq's arguments that the application of Texas law is "patently 'arbitrary' and 'unfair' and violates Due Process and Full Faith and Credit Clauses of the United States Constitution." There was no abuse of discretion due to misapplication of the law and the trial court's assessment that Texas law will apply under choice of law rules is affirmed.[5]

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[5] A brief filed by The Oklahoma State Chamber of Commerce and Industry, Inc., The Greater Oklahoma City Chamber, The Metropolitan Tulsa Chamber of Commerce, Inc., and The Center for Individual Freedom as *Amici Curiae*, suggests that certification of a nationwide class by applying the law of a manufacturer's business "is not warranted and could have a devastating effect on Oklahoma's economy" and "offends

## Class Certification

Having found the trial court did not err in determining that Texas law will apply herein, the inquiry into whether there was an abuse of discretion in the certification of the class is not ended. The certification of the class must be reviewed to determine if the law has been satisfied as to the requirements for numerosity, commonality, typicality, and adequacy of representation of the class. In making these assessments we do not reach the merits of the class's claims but only, as noted in *Scoufos*, identify core liability issues under the legal standards. As noted in *Ysbrand*, citing *Perry v. Meek*, 1980 OK 151, ¶19, 618 P.2d 934, 940, "[a] trial court's class certification order is reviewed for abuse of discretion" and that a "pragmatically correct action, in the face of a close question as to certification, has been said to sustain certification because if it develops later during the course of the trial that the order is ill-advised, the order is always (prior to judgment on the merits,) [sic] subject to modification." (Citations omitted.) 2003 OK 17, ¶5, 81 P.3d at 622. Numerosity was not at issue regarding the class, but Compaq argues that other certification requirements were not met.

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due process." However, the argument presented does not address the criteria identified in *Ysbrand* and required by § 2023. We are not free to ignore the explanation of Oklahoma law by the Oklahoma Supreme Court set forth in *Ysbrand.* Nor are we persuaded that their view of *Lapray* requires a different result based upon the record in this matter. The suggestion that "[a] proper choice of law analysis would have disregarded the class action nature of this suit" adds nothing to a proper analysis in view of the need for the court to determine which state bears the most significant relationship, a process which inherently requires looking at several states and which is not, contrary to the contention, some special process in class actions. In a class action there may merely be more jurisdictions to consider when determining which forum has the most significant relationship than would be present in a multi-state action involving fewer parties. Here the choice of law has not been made for the sake of expediency or efficiency but instead is based upon the application of law to the facts shown by the record.

Commonality and Predominance

Compaq argues that the commonality required by 12 O.S.2001 § 2023(A)(2) and the predominance required by 12 O.S.2001 § 2023(B)(3) are absent in the class. Commonality occurs when questions of law or fact are common to the class while predominance occurs when those common questions predominate over individualized questions of law or fact.

Plaintiffs claim that all the computer models at issue were shipped by Compaq with a floppy disk controller which is defective because a computer chip in each of them is missing essential microcode, *i.e.*, the defect is common to all the models. They argue all the defective computers were delivered with the same printed warranty language and that Compaq has failed to honor that warranty, another commonality.

Compaq argues that common claims do not predominate over individualized ones. Compaq states that even if Texas law applies there are "many individualized issues of proof such as manifestation of the alleged defect, reliance, notice and opportunity to cure and refund and damages." It claims that "neither Plaintiffs nor their experts have been able to establish that the allegedly defective FDCs have ever caused a single byte of data loss or any other malfunction in the normal, real-world use of a Compaq computer" and that until the computers malfunctioned, the class members had received exactly what they had bargained for, namely a computer. This argument presupposes facts to be determined at trial, is overly broad, and does not accurately reflect Plaintiffs' claims or theories. Further, it ignores that the record contains testimony by the class representatives that they had experienced malfunctions resulting in the loss of data, *i.e.*, the problem allegedly due to the FDC were not speculative for them.[6]

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[6] In addition, the affidavit of at least one of Plaintiffs' experts states that he replicated failures of computers during testing and observed failures during testing conducted by Compaq.

Whether malfunctions occur as claimed and whether at the time of any malfunction the computer was "under normal use" are fact questions for trial.

Compaq also argues the Certification Order errs as to notice, contending its warranty requires such notice but that "Texas law does not recognize a special class action notice rule in breach of warranty cases." This alleged deficiency is not relevant to our analysis of this matter as it now stands. The *procedural* law to be applied when determining the appropriateness of the use of the class action device is Oklahoma's law, not that of Texas. As to the *substantive* law of Texas, it is also a questionable conclusion that there is a "special class action notice rule." As stated in *Black Hawk Oil Company v. Exxon Corporation*, 1998 OK 70, ¶29, 969 P.2d 337, 345, the inability to prove reliance may ultimately defeat a claim, but, (citing *Gorsey v. I.M. Simon & Co., Inc.*, 121 F.R.D. 135, 138 (D.Mass. 1988)), "reliance goes to the merits of the case and cannot be considered by a court on a certification motion." "Whether individual findings of reliance are required goes to the merits of the claims." *Ysbrand,* 2003 OK 17, 21, 81 P.3d at 627.[7] The merits of the claims are not before us.

Compaq argues further that Texas law does not recognize a "defective in the box" theory for recovery, instead requiring actual malfunction for a breach of warranty claim. We do not agree given that in *Lapray* the Court noted that although there are few cases discussing benefit of the bargain or unmanifested defects in an express warranty context, "benefit of the bargain" cases are rooted in basic contract law and the

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[7] Where, as here, the object of reliance is uniform, we are unpersuaded that *Sias v. Edge Communications, Inc.*, 2000 OK CIV APP 72, 8 P.3d 182, in which another division of this court declined to apply *Black Hawk Oil*, noting uniformity was not shown in that matter for the text on at least 20 versions of telephone cards or the point of sale marketing, requires a different analysis or result.

measure of damages in such cases "is neither novel nor exotic," 135 S.W.3d at 679, citing *Coghlan v. Wellcraft Marine Corporation*, 240 F.3d 449, 452 (5th Cir. (Tex.) 2001). When discussing unmanifested defect/benefit of the bargain cases, the Court in *Lapray* stated "[w]e do not reach the issue" but it also noted its courts of appeal had reached differing conclusions.[8] 135 S.W.3d at 680.

Compaq argues that the claims of the class do not meet the prerequisites of § 2023 and that even if claims are common to the class, individualized inquiries are needed, negating predominance as to the issues such as reliance upon industry standards and specifications for computer chips. The Court in *Ysbrand* approved text in *Alpern v. UtiliCorp United Inc.*, 84 F.3d 1525, 1540 (8th Cir. (Neb.) 1996), stating that "factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event *or course of conduct* as the class claims, and gives rise to the same legal or remedial theory." (Emphasis added). The Court also cited to *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir.(Cal.) 2001), wherein the Court held that "where the lawsuit challenges a . . . practice or policy that affects all of the punitive class members . . . individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality."

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[8] The Court cited *Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349 (Tex.App. 2003), in which a class certification was reversed due to insufficient predominance of common issues based upon affirmative misrepresentations or omissions and alleged consumer protection/deceptive trade practices violations, the *Ogle* Court noting that "the class allegations contain no contract, warranty, or products liability claims," 108 S.W.3d at 351, and *Microsoft Corporation v. Manning*, 914 S.W.2d 602 (Tex.App. 1995), in which a class was certified for an action based upon breach of warranty claims for an unmanifested defect in software. The *Manning* Court noted "it is not necessary for the purchasers to actually suffer a loss of data as a result of that defect for them to suffer damage. They have received less than they bargained for when they acquired the product." 914 S.W.2d at 609.

Plaintiffs challenge Compaq's claimed course of conduct regarding computers containing an allegedly defective FDC in several respects, including but not limited to design, testing, decisions to ship, and the handling of complaints under its written warranty. Further, like notice, questions relating to reliance are factual determinations going to the merits of the claims which may not be used to defeat predominance. *Ysbrand*, 2003 OK 17, ¶20-21, 81 P.3d at 627.

The trial court here made the requisite findings regarding commonality and predominance, and its application of law finds support in the record developed at this stage of the proceedings. No abuse of discretion is shown as to commonality or predominance.

Typicality and Class Representation

Compaq also argues that 10 of the computer models differ in that they have a pre-loaded device driver and that the presence of this driver makes the machines materially different from those lacking this pre-loaded technology. They argue that the machine owned by the class representatives is one of those with the pre-loaded driver and they therefore will fail to "possess the same interest and suffer the same injury as the class members," citing *Amchem Products v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997). Restated, Compaq claims that, because of this pre-loaded device driver of the 35 models containing the FDC chip, Plaintiffs computer is one of 10 models which are not sufficiently similar to the others to be included within a class, and that therefore they fail the typicality requirement. We disagree that this pre-loaded feature necessarily has the effect attributed to it by Compaq.

Typicality requires that the claims of the class representatives be typical of those of the class, and to be "satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v.*

*Giuliani*, 126 F.3d 372, 376 (2nd Cir. (N.Y.) 1997). The essential element common to both typicality and commonality requirements is the need to ensure that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13 (1982).

Class certification is subject to later modification, and if necessary a class "may be divided into subclasses and each subclass treated as a class." 12 O.S.2001§ 2023(C)(4)(b). The 35 models all share the allegedly faulty FDC, and Plaintiffs claim their damages arise from that presence.[9] If upon consideration of the merits these 10 models out of the 35 models are demonstrably "materially different" from other computer models containing the FDC which are covered by the same printed warranty so as to require establishment of a subclass[10] or that those models be excluded from the class action, the trial court may then address that issue. Whether the presence of the pre-loaded program has the effect Compaq claims it does upon the FDC is a merits question, not an element for consideration at this procedural stage. Even if the 10 models

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[9] Whether they may recover "loss of use" damages, whether such damages are consequential or incidental damages, and whether the warranty excluding recovery of such damages is enforceable are questions for the trial court and are not a factor for certification purposes. The warranty states: Compaq is not liable for any damages caused by the product or the failure of the product to perform, including any lost profits, lost savings, incidental damages, or consequential damages." Compaq also argues Plaintiffs' claims are not typical because they no longer have possession of their computer. Plaintiffs respond that the computer was turned over to their counsel to prevent any claims of "spoilation of evidence" and for testing. The "loss of use" payment was made to them because of this.

[10] A class action also may be "brought or maintained . . . with respect to particular issues." 12 O.S.2001 § 2023(C)(4)(a).

have some differences, class members need not share "every factual and legal predicate to meet the commonality and typicality standards." *Ysbrand*, 2003 OK 17, ¶21, 81 P.3d at 627 (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d Cir. (N.J.) 2001)).

Compaq also argues Plaintiffs' claims are not typical because at one point prior to filing suit they attempted to sell their computer. However, they did not do so. They would, therefore, take part in and retain a stake in any relief granted by a judgment in favor of the class.[11] Plaintiffs' claims are based upon warranty provisions stating that the Compaq computers are "free from defects in materials or workmanship" and that during the warranty "Compaq will, at no additional charge, repair or replace defective parts with new equivalent or superior parts or, at the option of Compaq, serviceable used parts that are equivalent or superior to new parts in performance." Plaintiffs' lawsuit on behalf of themselves and the class is premised upon the claim that Compaq did not fulfill its duties under the warranty because the models at issue were delivered in a defective condition due to the FDC and Compaq did not repair or replace that defective part. The trial court finding that "the claims and defenses of the representative parties are typical of the claims or defenses

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[11] Compaq argues that their interest in the proceedings "is rendered dubious" because they tried to sell the computer and Plaintiff Stephen Grider testified that "they no longer had any use for it." Leaving aside whether a party's subjective need for an object has the effect urged by Compaq, the actual testimony in response to the question "[w]hy did you-all put the computer up for sale?" was "[w]e didn't need it *and was having problems with it.*" (Emphasis added.) A question asking if the Plaintiffs continued to use the computer before offering it for sale elicited the response: "We—we got to the point to where, you know, we were frustrated with it and we just put it up and decided to get rid of it. I was used sporadically." This testimony reveals more than one potential motivation for the attempted sale.

of the class" is supported in the record. The trial court did not err as to typicality.

The trial court found that Plaintiffs would "fairly and adequately protect the interest of the class." Compaq argues the record does not support this conclusion not only because the pre-loaded driver makes their computer atypical, but also because they are seeking relief different from that requested for the class.[12]

The relief requested in Plaintiffs' petition for the class include refunds, a declaration of rights under the warranty and the UCC, and specific performance of the warranty. In arguing that the relief requested shows a lack of typicality causing Plaintiffs to be inadequate representatives, Compaq contrasts the request for declaratory relief with their deposition testimony indicating they were seeking a refund. Whether this constitutes a conflict of interest or a lack of full understanding by non-lawyers of what relief is recoverable is speculative at this juncture.

Plaintiffs respond to Compaq's adequacy arguments by noting that both the refund and declaratory relief requests arise from Compaq's express warranty. Their petition does not limit the request for a refund to Plaintiffs but instead asks for damages "[a]lternatively and cumulatively" with their request for declaratory relief for themselves and the class for the alleged breach of the warranty in the form of a full refund, the difference in value of the computer "with and without the defect" *or* damages, unspecified, for "breach of the obligation to repair or replace."

"Possible conflicts that can arise only after judgment will be ignored at the certification stage." *Black Hawk Oil*

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[12] Compaq does not argue that Plaintiffs' counsel is unqualified or incapable of properly conducting litigation for the class action, only that Plaintiffs themselves are inadequate to represent and are atypical of the class.

*Company v. Exxon Corporation*, 1998 OK 70, ¶36, 969 at 346. The trial court finding Plaintiffs will adequately represent the class is not an abuse of discretion based upon the record.

Certification under Section 2023(B)

Compaq states the trial court erred in certifying the class under § 2023(B)(1) or (2). As to § 2023(B)(1), Compaq argues that Plaintiffs did not make any showing regarding the "realistic possibility of individual lawsuits if this case were not certified as a nationwide class action" and that instead Plaintiffs argued "that the small amount at stake actually makes individual lawsuits unlikely." Section 2023(B)(1)(a) requires a showing of "risk" of inconsistent or varying adjudications resulting in the establishment of incompatible standards.

Compaq further argues that the trial court made no finding that "inconsistent or varying adjudications" would produce "incompatible standards of conduct" for it to follow. Compaq argues that the lack of a finding satisfying § 2023(B)(1)(a) is not an oversight because it does not need protection from individual actions with inconsistent legal standards because this is not a situation in which Plaintiffs seek recovery from a potentially insufficient fund and that *stare decisis* is insufficient to certify a class. We need not analyze this argument further because the trial court was not limited to certification under § 2023(B)(1)(a).

While we agree that the Certification Order does not specifically find Compaq would be subject to "incompatible standards of conduct" when it found that "separate actions by affected consumers against [Compaq] run a substantial risk of inconsistent or varying adjudications with respect to the individual members of the class," *i.e.* the first factor named in § 2023(B)(1)(a), it also found that there was "a substantial risk of adjudications with respect to individual members of

the class which as a practical matter be dispositive of the interest of other members of the class not parties to the separate action," i.e., the factor named in § 2023(B)(1)(b).

As to § 2023(B)(2), Compaq argues the trial court failed to enter the requisite findings for certification under this provision, and, in particular, a finding that the class is "cohesive." Compaq argues that the "classes must be 'cohesive,' and that requirement is not met when individual issues predominate." Having concluded that the trial court did not abuse its discretion, based upon the record, in finding that common questions of law and fact predominate, we could reject an underlying premise of Compaq's argument, but it is not necessary to do so.

The trial court also found that "the questions of law and fact in this case which are common to the members of the class, predominate over any questions which might effect [sic] only Plaintiffs, or other individual members" and that

> a class action is superior to other available methods for a fair and efficient adjudication of the controversy. In reaching this conclusion, the Court also considered the interest of members of the class in individually controlling the prosecution of separate actions, the extent and nature of any litigation concerning this controversy or any commenced by members of the class, the desirability or undesirability of concentrating the litigation of the claims in a particular forum, and the difficulties likely to be encountered in the management of a class action, and determined that each of those factors support the conclusion that the class action is superior to other available methods for resolving the controversy.

These findings address the requirements for certification under § 2023(B)(3).

Section 2023(B)(1) states the showings required in that statute are to be satisfied, but the requirement is stated *in the*

*disjunctive*. The trial court did not have to make specific findings satisfying § 2023(B)(1)(a) *and* § 2023(B)(1)(b) *and* § 2023(B)(2) *and* § 2023(B)(3). Even if the requirements of § 2023(B)(1) and § 2023(B)(2) were not met, class certification is not demonstrated to be an abuse of discretion under § 2023(B)(3) for the reasons stated above. Only one part of § 2023(B) needed to be satisfied for certification of the class after the requirements of § 2023(A) were met. That has occurred here.

## CONCLUSION

Class certification is reviewed for an abuse of discretion as to the application of the law, with inquiry limited on appeal to the facts necessary for that review and without a determination of the merits. The record supports the trial court's orders on the issues raised on appeal as to the satisfaction of statutory requirements under § 2023 for class certification, including choice of law, commonality, typicality, predominance and adequacy of the class representatives. No abuse of discretion having been demonstrated, and the trial court's order certifying the class is affirmed.

AFFIRMED

MITCHELL, P.J., and HANSEN, J., (sitting by designation), concur.

**APPENDIX C**

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed September 23, 2005]

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No. CJ-2003-969

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STEPHEN GRIDER and BEVERLY L. GRIDER
Individually and on Behalf of Those Similarly Situated,
*Plaintiffs,*

vs.

COMPAQ COMPUTER CORPORATION,
*Defendant.*

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ORDER GRANTING CLASS CERTIFICATION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

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NOW on this 23rd day of September, 2005, the above-captioned matter having come on for hearing on Plaintiffs' Motion for Class Certification, Defendant's objections thereto, oral argument, briefing, and the Court having fully considered the authorities makes the following Findings of Fact for purposes of this Motion and this Order:

A. Findings of Fact:

1. Plaintiffs own a personal computer manufactured and sold by Defendant, which said computer is covered by a written express warranty statement from Defendant that warrants that the computer is free from defects in materials and workmanship.

2. Defendant has sold more than 1.7 million of the computers comprising the Affected Models Identified in the Class Definition (Exhibit A) hereto to purchasers throughout the United States during the period covered by the class action, each of said computers containing the same written express warranty, warranting the computer to be free from defects in materials and workmanship.

3. Plaintiffs allege:

(a) That the floppy disk controller function of the Super I-O chip (FDC) and each computer of the affected models is defective because it was sold with a required component missing, and that the FDCs in these computers are missing a physical mechanism, namely Control Logic Circuits or Microcode, to detect and report a common phenomenon inherent in the architecture of personal computers called "overruns" and "underruns";

(b) This is a negative value consumer class action about a computer part that was defective in the box as and when the computer was sold because the potential remedies in the case are too small to justify any individual to bear the expense of suing Defendant on the defect at issue;

(c) Industry and Defendant's own specifications require FDCs to incorporate and use control logic internal to the FDC that would detect and report 100% of all overruns and underruns;

(d) The FDCs in all the Affected Models in the class do not have the required mechanism to detect and properly report 100% of overruns and underruns, and, thus, do not meet industry standards or Defendant's own specifications.

(e) The Class consists of the models Compaq identifies as containing the defective FDC, shown as Exhibit A, attached hereto, and made a part hereof, and reflected on

Plaintiffs' Exhibit 13 of the Plaintiffs' Certification Presentation Exhibits, incorporated herein by reference.

(f) Defendant has failed and refused to honor the expressed warrantics provided with each computer.

(g) Defendant, the party opposing the class, has acted or refused to act on grounds generally applicable to the class, that is, they have failed to honor the warranty thereby making a final injunctive relief or a corresponding declaratory relief with respect to the class as a whole, appropriate in the case.

4. Class counsel are experienced trial lawyers, with substantial experience in handling class action litigation, and said counsel have the resources and the technical expertise to present and properly prosecute the claims.

B. Conclusions of Law:

1. Class Actions in Oklahoma are governed by Title 12 Oklahoma Statutes, Section 2023, which said Statute is incorporated herein by reference and made a part hereof, and, generally speaking, require numerosity, commonality, typicality, and adequate representation of the class.

2. In addition, certification of an "opt out" class requires, in addition to the four requirements mentioned above and found in Section A of 12 O.S. 2023, the statute requires either:

(a) a risk of inconsistent or varying adjudications or adjudications which would as a practical matter be dispositve of the interest of other members of the class who were not parties to this suit, or,

(b) the party opposing the class, the Defendant herein, has acted or refused to act on grounds generally applicable to the class, thus making injunctive and or declaratory relief appropriate with respect to the class as a whole; or

(c) questions of law or fact common to the members of the class predominate over questions of law or fact affecting the individual members, and class action is superior to other available methods with the fair and efficient adjudication of the controversy, which said alternative requirements are found at 12 O.S. § 2023(B).

3. The class herein sought to be certified is so numerous that joinder of all members is impractical;

4. There are questions of law and fact common to the class including allegations of a common defect, common warranty, and common relief all as is shown by the exhibits to Plaintiffs' Certification Presentation, incorporated herein by reference and made a part hereof, and all as is shown by the record herein.

5. In analyzing the allegations of Plaintiffs, and claims made and authorities cited, the Court concludes that the claims and defenses of the representative parties are typical of the claims or defenses of the class, representative parties will fairly and adequately protect the interest of the class, separate actions by affected consumers against Defendant run a substantial risk of inconsistent or varying adjudications with respect to the individual members of the class, and a substantial risk of adjudications with respect to individual members of the class which as a practical matter be dispositve of the interest of other members of the class not parties to the separate action;

6. Further, the Court, by this analysis, concludes that the questions of law and fact in this case which are common to the members of the class, predominate over any questions which might effect only Plaintiffs, or other individual members, and, thus, a class action is superior to other available methods for a fair and efficient adjudication of the controversy. In reaching this conclusion, the Court also considered the interest of members of the class in individually control-

ling the prosecution of separate actions, the extent and nature of any litigation concerning this controversy or any commenced by members of the class, the desirability or undesirability of concentrating the litigation of the claims in a particular forum, and the difficulties likely to be encountered in the management of a class action, and determined that each of those factors support the conclusion that the class action is superior to other available methods for resolving the controversy.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Class Certification be, and the same is hereby, granted, over Defendant's objections and opposition, and the parties are ordered and directed to proceed accordingly.

Counsel to be notified in person or by telephone of this order this date and the Bailiff is ordered to mail file-stamped copies of this Order to all attorneys of record.

Dated this 23rd day of September, 2005, at Norman, Oklahoma.

/s/ Tom A. Lucas
Tom A. Lucas
Judge of the District Court

# Our class consists of the models Compaq identifies as containing the defective FDC:

- Presario desktop models:
  - 2266
  - 2275
  - 2281
  - 2285V
  - 2286
  - 2412ES
  - 2416ES
  - 5070
  - 5184
  - 5440
  - 5451
  - 5460
  - 5465
  - 5185
  - 5301
  - 5304
  - 5304b
  - 5340
  - 5345
  - 5360
  - 5365
  - 5410
  - 5441
  - 5452
  - 5461
  - 5710
- Tiger laptop 1700 series:
  - 17XL266
  - 17XL274
  - 17XL264
  - 17XL266
  - 17XL260
  - 17XL261
  - 17XL262
  - 17XL275
  - 17XL265
  - 1700T[CTO]

*See various Compaq discovery responses, Ex. OSCE-2

EXHIBIT
A

## APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

[Filed JAN. 18, 2005]

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THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * * *

101,564 Stephen & Beverly L.. Grider, individually and behalf of those similarly situated v. Compaq Computer Corporation

Petition for certiorari to review certified interlocutory order is denied.

ALL JUSTICES CONCUR

/s/ Joseph M. Watt
CHIEF JUSTICE

**APPENDIX E**

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed NOV. 22, 2004]

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Case No. CJ-03-969 TL

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STEPHEN GRIDER and BEVERLY L. GRIDER,
Individually and on behalf of those similarly situated,
*Plaintiffs*,

vs.

COMPAQ COMPUTER CORPORATION,
*Defendant.*

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CERTIFICATION OF OCTOBER 26, 2004 ORDER FOR INTERLOCUTORY APPEAL AND STATEMENT PURSUANT TO SUP.CT.RULE 1.52(b)

On October 26, 2004, this Court issued and filed its Order Declaring Choice of Law ("Order"). Defendant Compaq Computer Corporation has moved the Court to certify the Order for interlocutory appeal pursuant to 12 O.S. 2001, § 952(b)(3) and Sup.Ct.R. 1.50. Having considered arguments of counsel, the Court finds good cause to grant such motion. Accordingly, the Court hereby certifies that an immediate appeal from its October 26, 2004, Order may materially advance the ultimate termination of the litigation, for reasons set forth below.

Pursuant to Sup.Ct.R. 1.52(b), the Court hereby issues its statement of what the pertinent parts of the records will disclose, and statement of why the Court's Order should be reviewed in advance of final judgment.

Statement of What Pertinent Parts of the Record Will Disclose

Plaintiffs filed this putative national class action against Compaq Computer Corporation on June 4, 2003, alleging breach of warranty relating to allegedly defective floppy disk controllers. No class has yet been certified herein. When Plaintiffs filed this action there was pending a virtually identical case with an already certified nationwide class against the same Defendant (Compaq) in Jefferson County, Texas. The Texas district court held that Texas law could be applied to all class members' claims. Compaq appealed the Texas class certification decision, and on December 22, 2003, this Court entered an agreed stay of proceedings in this Court pending conclusion of the Texas proceedings.

On May 7, 2004, the Texas Supreme Court reversed the nationwide class certification in *Compaq Computer Corp. v. LaPray*, 135 S.W. 3d 657 (Tex.2004). A copy of the Texas Supreme Court's opinion is attached hereto as Exhibit "A." The Texas Supreme Court rejected the district court's holding that Texas law could properly be applied to nonresident class members' warranty claims. The Texas Supreme Court held that the trial court abused its discretion "in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims."

On June 18, 2004, Plaintiffs herein moved to lift the stay on the ground that the Plaintiffs in *LaPray* were abandoning efforts to certify a national class action in Texas and that the Texas Supreme Court's decision had foreclosed a national class action. This Court granted the motion to lift the stay on July 28, 2004, and at Compaq's request directed the parties to file briefs relating to choice of law in this action. Plaintiffs filed their briefs on choice of law, and the Court heard oral argument on the choice of law issues on October 12, 2004.

This Court issued and filed its Order Declaring Choice of Law on October 26, 2004. The Court selected application of Texas law, for the reasons set forth therein, relying heavily upon the Oklahoma Supreme Court's decision in *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618.

Statement of Why the 2004 Order Should be Reviewed in Advance of Final Judgment

The Court has decided a difficult and important public policy issue potentially implicating comity between Oklahoma and an adjoining sister state, Texas, and the rights of states under the United States Constitution, relying on a first impression extension of Oklahoma Supreme Court precedent to material new facts (*i.e.*, the Texas Supreme Court's prior decision on the same issue).

In *Ysbrand v. DaimlerChrysler Corp.*, 2003 OK 17, 81 P.3d 618, a national class action asserting breach of warranty claims, the Court ruled that an Oklahoma court may apply the law of the state where defendant has its corporate headquarters and makes critical decisions regarding the allegedly defective product. However, the Supreme Court did not in *Ysbrand* have before it the circumstances present in this case, that the highest court of such other state—here, Texas—has previously and very recently considered the issue of choice of law on the same warranty claim brought against the same defendant in a national class action in Texas' courts, and has held under Texas law that its laws cannot properly be applied to claims arising from the sale of product outside Texas, notwithstanding the Compaq has its corporate headquarters in Texas. *Compaq Computer Corp. v. LaPray*, 135 S.W.3d 657, 680-81 (Tex. 2004) (Exhibit "A" hereto). This Court has held that Oklahoma law as articulated in *Ysbrand* requires the application of Texas law to the warranty claims of all consumers in all states.

An early appellate review of the Court's ruling in this putative national class action, that Texas law applies to the claims of all Plaintiffs, may result in significant savings of this Court's resources, the parties' litigation costs and expenditure of time in the class certification proceedings and at trial, in the event the Court's choice of law ruling is determined to be erroneous on appeal.

Immediate appeal of the Court's ruling will materially advance the resolution of the issue of class certification and an appellate decision at this state may have enormous potential to materially advance the ultimate termination of the litigation.

The Court believed that the requirements of Okla.Stat.tit. 12 § 953 (b)(3) and Okla.Sup.Ct.R. 1.50 for certification of its Order for interlocutory appeal are met.

/s/ Tom A. Lucas
TOM A. LUCAS
Judge of the District Court

APPROVED AS TO FORM:

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**APPENDIX F**

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

[Filed OCT. 26, 2004]

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Case No. CJ-2003-969

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STEPHEN GRIDER, *et al.*,
*Plaintiffs,*

v.

COMPAQ COMPUTER CORPORATION,
*Defendant.*

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ORDER DECLARING CHOICE OF LAW

This matter comes on for hearing on the request of the parties to determine the choice of law to be used in this case, the Court having heard arguments and taken the matter under advisement, and having considered the briefs and authorities submitted by the parties, finds:

1. Claims of the parties:

A. Plaintiffs claim that Texas law should be applied (choice of law) because:

1. Oklahoma has adopted the most significant relationship test to cases such as this;

2. Texas has the most significant relationship to this case because:

(a) Texas is most directly connected to the parties and the transactions, and thus has the most interest in seeing its law applied;

(b) Texas is the only state where conduct relevant to all potential Plaintiffs in Oklahoma occurred;

(c) Texas is Defendant's headquarters, principal place of business, and home state, and has the most important contact regarding Uniform Commercial Code warranty claims;

(d) All final and important decisions regarding the design, manufacture, distribution, and selection of parts, including floppy disk chips, are made in Texas;

(e) Warranties arc not customarily negotiated between distributors and consumers, in any state, other than to simply agree/understand that Compaq, the principal headquarters in Texas, makes the warranty;

(f) All distribution and warranty decisions are made in Texas;

(g) The decision to honor or not honor the warranty is made in Texas;

(h) Thus, the selection of Texas law as the choice of law is not arbitrary, nor fundamentally unfair (doesn't violate due process);

relying primarily on *Ysbrand v. DaimlerChrysler Corporation*, 81 P3d 618, 2003 OK 17, Cert. Denied; *Collins Radio Company of Dallas v. Bell*, 623 P2d 1039, 1980 OK CIV APP 57; *Phillips Petroleum Company v. Shutts*, 472 US 797, 818 (1985); and other cases cited in the briefs.

B. Defendant claims that the law of Oklahoma should apply because:

1. The Texas Supreme Court has already ruled that Texas is not the proper forum for a class action on breach of this warranty, because:

(a) The Laws or various states are in conflict; and

(b) The laws of the consumer state have the most significant relationship to the cause of action;

2. Consumers' home state (Oklahoma) has the most significant relationship to the cause of action;

3. The place of contract, the place of negotiations, location of the subject matter, place of delivery of the goods, and residence of Plaintiffs is Oklahoma;

4. The consumer's home state has an interest in protecting its consumers;

5. To apply Texas law to an Oklahoma case would violate the U.S. Constitution because Texas is a sovereign state and full faith in credit and due process of law require Texas decisions be upheld, including the decision in *Compaq Computer Corp. v. LaPray*;

6. The due process clause is violated because to apply Texas law to an Oklahoma case is arbitrary and fundamentally unfair;

7. Comity requires the use of Oklahoma law, citing *LaPray* and *Bridgestone/Firestone*, wherein Texas has already spoken to this issue;

8. Application of Texas law to an Oklahoma case violates the Commerce Clause of the United States Constitution as such action would constitute "regulating" commerce beyond its borders by Oklahoma, which no state has the power to do;

relying primarily on *Compaq Computer Corp. v LaPray*, 135 SW.3d 657, 681 (TEX 2004); *Ysbrand v. DaimlerChrysler Corporation*, 81 P.3d 618, 2003 OK 17; Restatement (2d) of Conflict of Laws, 1971, Section 191, Section 188 (2); and other cases cited in the briefs.

II. Findings of Fact and Conclusions of Law

A. Findings of Fact:

After reviewing the briefs, the Court finds the following facts to be either true, or undisputed for purposes of this analysis and decision:

1. The computer parts, including the part alleged herein to be defective, are manufactured in various foreign countries including Taiwan, and assembled in the Taiwan;

2. Texas is the home state, headquarters, and principal place of business of Compaq Computer Corporation;

3. All major decisions regarding manufacture, specification, testing, acceptance, distribution, and warranties of the parts and product herein under consideration are made in Texas at the Defendant's headquarters/home office;

4. The product upon which the Plaintiff bases her claim was sold, distributed and delivered in Oklahoma;

5. The Plaintiffs/consumers' home state is Oklahoma;

6. Sold in the same box with the computer is the printed form, Compaq Consumer Warranty Against Defects and Materials and Workmanship; under which said warranty Compaq is obligated to repair or replace the defective part or provide a refund;

7. The decision to address the claim of defective part including the decision to honor or decline the warranty were all made in the State of Texas at Compaq headquarters;

8. Compaq's management for the affected computers which are the subject of this case is located in Texas;

9. The "core" teams (design, evaluation and technical) for the affected computers are in Texas;

10. The final decision of which components were to be used in the subject computers, including testing and selection of the defective FDC chip occurred in Texas;

11. The purchase of the defective FDC chip was authorized by Compaq management in Texas and bought through the chip manufacturer's office in Texas;

12. From its headquarters in Texas, Compaq has the power to require its manufacturing contractors to change a component;

13. From its headquarters in Texas, Compaq has the power to stop shipping computers with a defective part, assess its impact on the consumer, and make the decision as to whether to ship the computer with the alleged defective FDC chip;

14. Compaq made the decision in Texas to continuing shipping computers with the allegedly defective part even after litigation related to the computers was first filed;

15. Compaq's decision on what terms, provisions and conditions were to be included in the subject warranty were made in Texas;

16. The apparatus for handling consumer warranty complaints is centralized in Texas;

17. The technical decision on whether a particular problem is a "defect" under warranty is made in Texas;

18. All persons who would address the FDC problem at issue are located in Texas;

19. Compaq contracted to have the computers in question assembled in Taiwan;

20. The motherboards for the various computers were manufactured by companies around the world including Taiwan, China, Korea, Brazil, California and Texas;

21. Some of the validation testing of the hardware, including the FDC, occurred in Korea;

22. The decision to use the ITE 8661 Super I/O chip in certain computers was made in Korea;

23. The computers were distributed throughout the United States and sold to consumers through retailers located in each of the fifty states and District of Columbia, including Oklahoma.

B. Conclusions of Law:

1. Oklahoma has adopted the "most significant relationship" test to questions involving choice of law involving UCC warranty claims. Under this test, the appropriate choice of law is a substantive law of the state most directly connected to the parties and the transactions. *Ysbrand v. DaimlerChrysler Corporation.*

2. Oklahoma law, not Texas law, should be used to determine choice of law issues in Oklahoma, so long as the result of the application of Oklahoma law docs not violate the due process test set forth in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 818 (1985). In applying this test, Oklahoma courts are guided by the Restatement (2nd) of the Law of Conflicts, which lists relationships to be evaluated, including the place of contract, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement, Section 188 (2). *Collins Radio Co. of Dallas, Tex. v. Bell*, 623 P.2d 1039, 1980 OK CIV APP 57.

3. In actions on UCC warranties, Section 191 of the Restatement provides that a contract for the sale of goods is governed by the law of the place of delivery unless another state has a more significant relationship. Restatement, Section 191.

4. In Oklahoma, Section 6 of the Restatement provides several factors relevant to any choice of law decision, including the needs of the interstate or international systems, the relevant policies of the forum, the relevant policies of other interested states, and the relevant interest of those states in the determination of the particular issue, the protection of justified expectation, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied. *Ysbrand*, supra.

5. In cases involving UCC warranty claims, Oklahoma has held that the place of contracting, the place of negotiation and performance, and the location of the subject matter were of diminished significance to the sales of motor vehicles, and that UCC warranties are not something that is usually negotiated in the purchase of a motor vehicle. *Ysbrand*, supra. In that case, the court found that Michigan's interest in having its regulatory scheme applied to conduct of a Michigan based manufacturer was most significant, and, clearly more significant than the relative interest of each buyer's home state in applying its version of the UCC.

6. The place where decisions concerning the design, manufacture and distribution of the UCC warranted goods were made, together with the principal place of business of the manufacturer of the UCC goods are the most important contacts and constitute the most significant relationships with respect to UCC warranty claims. *Ysbrand*, supra.

7. The State of Texas is most directly connected to the parties and to the transaction by virtue of Texas being the situs of virtually all important decision making regarding the manufacture, assembly, and distribution of the computer, the situs of determining what warranty would be made, the parameters of said warranty, and the decisions as to whether to honor or not honor said warranty, as well as the situs of the decision as to whether or not the warranty has been invoked.

Thus, under the most significant relationship test, Texas law should be applied to the UCC warranty issues in this case.

8. Application of Texas law in this Oklahoma case does not offend due process of law as guaranteed by the Constitution because Defendant clearly has sufficient contacts with this state to give the state jurisdiction and would assure Defendant of not only uniformity of result if more than one claim is made in Oklahoma, but would also give Defendant the benefit of its home state's substantive law concerning UCC warranties, that is the law of its home state.

9. Further, the significant aggregation of contacts with Texas set forth above in the Findings of Fact assure Defendant that applying Texas law is neither arbitrary or fundamentally unfair. In fact, it is difficult to see how anything could be more fair to Defendant than to apply the substantive law of Texas to claims against its UCC warranties because of the significant aggregation of contacts recited above.

10. Comity is not a rule of law, but one of practical convenience and expediency, and, in this case, most practical, convenient, and expedient way to resolve the issues concerning Compaq's UCC warranties is to apply Texas law.

11. Although Texas in *Compaq Computer Corp. v. LaPray* declined to certify a class action on the grounds that, inter alia, the conflicting laws in each state where the computers are sold is the most significant relationship and contact, this decision appears to be contrary to the decision of the Oklahoma Supreme Court in *Ysbrand v. DaimlerChrysler Corporation*, and, in this case, Oklahoma law should control in determining choice of law issues.

12. For this Court to try to determine whether a consumer in Oklahoma would expect Oklahoma law to apply to the Texas warranty would be pure speculation, and probably incapable of a certain determination.

13. Application of Texas law to this Oklahoma case does not violate Texas' sovereignty, nor does it constitute a burden on the interstate market, nor does it violate the full faith in credit clause and due process law of the Constitution. *Ysbrand v. DaimlerChrysler Corporation*, supra.

14. If a court does not apply Texas law to a Texas UCC warranty, a manufacturer cannot know or determine what their warranty means or how it will be applied.

Decision/Order

The Court, by this decision determines that the substantive law of Texas is the law to be applied to this claim against Defendant's UCC warranty.

Bailiff is ordered to mail a true copy of this Order to attorneys of record and make proof thereof herein.

Dated this 26th day of October, 2004, at Norman, Oklahoma.

/s/ Tom A. Lucas
Tom A. Lucas
Judge of the District Court

**APPENDIX G**

SUPREME COURT OF TEXAS

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No. 02-0705

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COMPAQ COMPUTER CORPORATION,
*Petitioner*,

v.

HAL LAPRAY, *et al.*,
*Respondents.*

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Argued Oct. 15, 2003
Decided May 7, 2004

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Justice JEFFERSON delivered the opinion of the Court.

Plaintiffs Hal LaPray, Tracy D. Wilson, Jr., and Alisha Seale Owens, on behalf of themselves and all others similarly situated, sued Compaq Computer Corporation alleging that Compaq sold them computers containing defective floppy disk controllers ("FDCs"). The trial court certified a nationwide class under Rule 42(b)(2) and (b)(3)[1], Tex.R. Civ. P., and

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[1] Actually, the trial court (by order dated July 23, 2001) certified the class pursuant to Rule 42(b)(2) and (b)(4). Effective January 1, 2004, however, subparagraph (b)(3) was deleted from Rule 42, and former subparagraph (b)(4)—with minor changes not pertinent to our decision—is now (b)(3). *Compare* TEX.R. CIV. P. 42 and TEX.R. CIV. P. 42 General Commentary—2003 ("Subparagraph (b)(3) is omitted as unnecessary.") *with* TEX.R. CIV. P. 42, 553-554 S.W.2d (Tex.Cases) XXXVI-XXXVIII (1977, amended 2004). For ease of reference, we will refer herein to (b)(3), and those references will include former subparagraph (b)(4). As amended, Rule 42(b)'s subsections are now numbered the same as Federal Rule of Civil Procedure 23(b). *See* FED.R.CIV.P. 23(b). We note too that,

the court of appeals affirmed. For the reasons set forth below, we reverse the court of appeals' judgment and remand this case to the trial court for further proceedings consistent with this opinion.

I

Factual Background

Plaintiffs allege that the affected computers, some thirty-seven models of Compaq Presario computers, contain defective FDCs. FDCs control the transfer of data (broken down into individual characters called "bytes") between a computer's memory and a floppy disk. Plaintiffs claim that, in certain circumstances, computer system "latencies"[2] can lead the FDC to fail to identify that data has been written incorrectly to the floppy disk—a condition called an "under-reported underrun"—resulting in the loss of a byte of data. The plaintiffs allege that the FDCs failed to meet industry standards adopted by Compaq and that Compaq identified the FDC problem as a "failure" of a "main feature" but elected to sell the computers anyway. Plaintiffs assert that the defective FDCs breached Compaq's limited warranty, which promised that the computers would be free from defects in materials or workmanship under normal use during the warranty period and that Compaq would repair or replace defective parts.

Lapray et al. sued Compaq, first in federal court then, after the federal court dismissed the claims without prejudice[3], in

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on remand, the trial court proceedings will be governed by the amended rule. *See Ex Parte Abell*, 613 S.W.2d 255, 260-61 (Tex.1981).

[2] A "latency" in this context is a delay: the amount of time it takes a byte of data to travel from one point to another on the computer motherboard.

[3] The federal district court granted Compaq's motion for summary judgment on plaintiffs' sole federal claim, holding that none of the three named plaintiffs met the $5,000 minimum damage requirement to state a claim under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

the 60th judicial district court in Jefferson County. Having abandoned their other causes of action, the plaintiffs allege only that Compaq breached its express warranty. The plaintiffs seek a declaration that (i) Compaq breached its express warranty, (ii) Compaq breached its obligation to repair, replace, or refund, (iii) the FDC defect is covered by Compaq's express warranty, and (iv) class members have a right to seek relief under the warranty. In the alternative, they seek damages, either in the form of a refund, the difference in value between a computer without the FDC defect and the computer as purchased, or damages for breach of the duty to repair or replace. Plaintiffs explicitly disclaim consequential damages from loss or corruption of data.

After a hearing on the plaintiffs' motion for class certification, the trial court certified a national class consisting of some 1.8 million computer buyers, including:

> All residents and citizens of the United States, other than those excluded below, who purchased from Compaq or from an authorized Compaq reseller any Compaq computer model that contains a SiS 6801 or ITE 8661 FDC, which are identified as being Presario desktop model numbers 2266, 2275, 2281, 2285V, 2286, 2412ES, 2416ES, 5070, 5184, 5185, 5301, 5304, 5304b, 5340, 5345, 5360, 5365, 5410, 5440, 5441, 5451, 5452, 5460, 5461, 5465, and 5710, Presario laptop model numbers 17XL2, 17XL266, 17XL274, 17XL264, 17XL266, 17XL260, 17XL261, I 7XL262, 17XL275, 17XL265, and 1700T[CTO].

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*Thurmond v. Compaq Computer Corp.*, 171 F.Supp.2d 667, 684 (E.D. Tex.2001). That court then declined to exercise supplemental jurisdiction over the remaining state claims and dismissed those claims without prejudice to refiling in state court. *Id.*

The following persons are excluded from the class:

> All government entities, bodies and agencies of any character, federal, state, or local, and their employees (in that capacity only); the presiding judge(s) and other court personnel, the Named Defendants and their employees.

Finding that the requirements of both Rule 42(b)(2) and (b)(3) were met, the trial court certified the class under both subsections. Additionally, the trial court concluded that it would "likely" apply Texas law to all class members' claims but deferred a final choice-of-law determination. The lengthy certification order includes findings of fact and conclusions of law, as well as a trial plan for the (b)(3) claims.

The court of appeals affirmed the trial court's certification order. 79 S.W.3d 779, 794. The court analyzed the trial court's certification of a (b)(2) class and held that declaratory relief was appropriate. The court of appeals then concluded that "[b]ecause the trial court certified the class under Rule 42(b)(2), and only alternatively certified the class under Rule 42(b)[ (3) ], and having found the trial court did not abuse its discretion in certifying a (b)(3) [sic] class, it is unnecessary to address issues five and six challenging the requirements of predominance and superiority." *Id.* at 791.

## II

## Jurisdiction

Because this is an interlocutory appeal from an order certifying a class action and there was no dissent in the court of appeals, this Court has jurisdiction only when the court of appeals "holds differently from a prior decision of another court of appeals or of the supreme court." TEX. GOVT CODE §§ 22.225(b)(3), (c), 22.001(a)(2).[4] Compaq argues

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[4] In 2003, the Legislature amended Government Code sections 22.001 and 22.225, but those changes do not govern this appeal. *See* TEX.

that the court of appeals' failure to analyze predominance and superiority conflicts with *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425 (Tex.2000). We agree.

In *Bernal*, we held that "[c]ourts must perform a 'rigorous analysis' before ruling on class certification to determine whether *all* prerequisites to certification have been met." *Id.* at 435 (emphasis added). Rule 42(b)(3) requires that the trial court find that "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy." TEX.R. CIV. P. 42(b)(3) (emphasis added). Predominanceand superiority analyses are vital to a determination of whether to certify a (b)(3) class, Indeed, predominance is "one of the most stringent prerequisites to class certification." *Bernal*, 22 S.W.3d at 433.

The court of appeals stated that "the trial court certified the class under Rule 42(b)(2), and only alternatively certified the class under Rule 42(b) [(3)], and having found the trial court did not abuse its discretion in certifying a (b)(3) [sic] class, it is unnecessary to address issues five and six challenging the requirements of predominance and superiority."[5] 79 S.W.3d

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GOV'T CODE §§ 22.001, 22.225 historical note (Vernon 2004) [Act of June 11, 2003, 78th Leg., R.S., ch. 204, §§ 1.05, 23.02(a) and (d), 2003 Tex. Gen. Laws 850, 898-99 ("H.B.4")].

[5] This statement is itself inaccurate. In fact, the trial court certified both a (b)(2) and a (b)(3) class. The class certification order states that: "[e]ach of the certification elements under both TRCP 42(b)(2) and TRCP 42(b)[(3)] are satisfied"; "the request to certify a (b)(2) class is granted"; "the Court finds that the requirements for (b) [(3)] certification are met in this case and certifies a (b)[(3] class"; "it is appropriate to certify both a 42(b)(2) and a 42(b)[(3)] class"; and "[t]he Court finds that a national class of all affected models is certifiable under both TRCP (b)(2) and TRCP 42(b)[(3)]." Moreover, the trial court noted that the two classes were substantively different: "the damages claim for breach [the (b)(3) class] does not overlap the claim for declaratory relief [the (b)(2) class]."

at 791. Thus, the court of appeals addressed only the (b)(2) issues but then affirmed the trial court's order (which certified both (b)(2) and (b)(3) classes) in its entirety. *Id.* at 794. The effect of the court of appeals' decision is to affirm the (b)(3) class without reviewing predominance and superiority. The class would be entitled to seek damages under the (b)(3) certification—as affirmed by the court of appeals—without any court ever having rigorously analyzed predominance and superiority. This directly conflicts with *Bernal*—a conflict that is apparent from the face of the court of appeals' opinion—and would operate to overrule it had the opinion issued from our court. *See Coastal Corp. v. Garza*, 979 S.W.2d 318, 319-20 (Tex.1998); *Hill v. Miller*, 714 S.W.2d 313, 315 (Tex.1986). Accordingly, we have jurisdiction over this interlocutory appeal.

III

(b)(2) versus (b)(3) Class Actions

The parties devote much energy and attention to whether this class properly falls under subsection (b)(2) or (b)(3) of rule 42. Tex.R. Civ. P. Compaq argues that the breach of warranty declaratory judgment claim is merely a predicate to a claim for damages and an attempt to "shoehorn" a damages claim into a (b)(2) claim for declaratory relief. Plaintiffs respond that (b)(2) certification is proper because they have disclaimed consequential damages and primarily seek a declaration that the FDC is defective and falls within Compaq's limited warranty.

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The court further explained that if it were to grant summary judgment on the damages claim, "*such a ruling would not dispose of Named Plaintiffs' claim for declaratory judgment.*" (Emphasis in original.) Contrary to the court of appeals statement, however, nowhere does the trial court state that it is certifying the (b)(3) class only in the alternative. Plaintiffs admitted as much in their court of appeals' brief "What the trial court did is certify the whole case and all remedies under both 42(b)(2) and TRCP 41(b) [(3)]."

Rule 42(b)(2) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> > the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

TEX.R. CIV. P. 42(b)(2). The Texas rule derives from its federal parallel, Rule 23(b)(2), and reads identically. TEX.R. CIV. P. 42 historical note (Vernon 1979) ("Subdivision (b)(2) is copied from revised federal rule 23(b)(2).").

"Subdivision (b)(2) was added to [the federal rules] in 1966 primarily to facilitate the bringing of class actions in the civil rights area." *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 506 n. 6 (5th Cir.1981) (quoting 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *Federal Practice & Procedure* 1775 at 470-71 (2d ed.1986))[6] "Before its adoption, the rules made no explicit reference to class actions involving injunctive or declaratory relief, and 'there was some uncertainty whether a class action seeking one of those remedies was an appropriate device for vindicating civil rights.'" *In re Monumental Life Ins. Co.*, 365 F.3d 408, 417 n. 16 (5th Cir.2004) (quoting WRIGHT, MILLER & KANE, *supra*, § 1775, at 470 (2d ed.1986)).

Commentators have observed:

> Much of the popularization of the Rule 23(b)(2)-type class action was accomplished in the late 1960s and early 1970s by legal services and other government and

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[6] Texas Rule of Civil Procedure 42 is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority. *Bernal*, 22 S.W.3d at 433.

> foundation-subsidized public interest attorneys, who sought to utilize this type of action as an inexpensive and powerful tool to provide representation for large numbers of indigent and minority persons who previously could secure little effective redress under the legal system. More recently, private counsel have been filing Rule 23(b)(2) class actions with increasing frequency in employment, civil rights, antitrust, environmental, securities, and other types of class litigation.

ALBA CONTE AND HERBERT B. NEWBERG, 2 NEWBERG ON CLASS ACTIONS 62-66 (2003) (citations omitted).

There are procedural distinctions between (b)(2) and (b)(3) class actions. While individual notice is required for classes certified under (b)(3), (b)(2) does not mandate individual notice. Additionally, rule 42(c)(2) provides that class members in a (b)(3) class are entitled to an opportunity to exclude themselves from the class and the preclusive effect of any judgment by "opting out" of the lawsuit. TEX.R. CIV. P. 42(c)(2); *see also Eubanks. v. Billington*, 110 F.3d 87, 92 (D.C.Cir.1997). The rule has no comparable provision for (b)(1) and (b)(2) classes. These distinctions have resulted in much legal wrangling over whether a class is appropriately certified under (b)(2) or (b)(3). As the Fifth Circuit noted, "plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections. The incentives to do so are large. Plaintiffs' counsel effectively gathers clients—often thousands of clients—by a certification under (b)(2). Defendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3)."[7] *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir.2000) (footnote omitted).

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[7] Still another motivation for seeking (b)(2) certification, addressed below, may be the perception that (b)(2) class representatives need not satisfy *Bernal's* "rigorous analysis" requirements.

The rule is silent on whether damages are available in a (b)(2) class. The Federal Rules Advisory Committee apparently contemplated the possibility and stated that (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." FED.R. CIV.P. 23(b)(2) advisory committee's note (1966 amendment). The "predominantly" requirement (not to be confused with (b)(3)'s "predominance" requirement) has engendered some debate. The Fifth, Seventh, and Eleventh Circuits have held that claims for monetary relief predominate over equitable claims unless the monetary relief sought is incidental to the requested injunctive relief. *See Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir.2001); *Jefferson v. Ingersoll Int'l, Inc.*, 195 F.3d 894, 898 (7th Cir.1999); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir.1998). On the other hand, the Second and Ninth Circuits have rejected this approach in favor of an ad hoc balancing to determine whether (b)(2) certification is appropriate under the circumstances. *Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir.2003); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2d Cir.2001).

The United States Supreme Court has not yet decided whether a (b)(2) mandatory class can include claims for monetary relief. Since 1966, when the Advisory Committee penned its note, the Supreme Court regularly has emphasized the importance of allowing affected persons to opt out of representative suits. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999); *Richards v. Jefferson County*, 517 U.S. 793, 799-802, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *see also Jefferson*, 195 F.3d at 897. In recent years, it has demonstrated growing concern regarding the certification of mandatory classes when monetary damages are involved. *See*

*Ortiz*, 527 U.S. at 844-48, 119 S.Ct. 2295; *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). In fact, the Supreme Court has stated that there is "at least a substantial possibility" that actions seeking monetary damages are certifiable only under (b)(3), which provides class members notice and the right to opt-out, *Ticor Title*, 511 U.S. at 121, 114 S.Ct. 1359. The Fifth Circuit "recognize[d] that the Supreme Court's decision in [*Ticor Title*] casts doubt on the proposition that class actions seeking money damages can be certified under Rule 23(b)(2)" and stated that "[w]ere we writing on a clean slate, we might give further consideration to the extent to which monetary relief is available at all in 23(b)(2) class actions. However, in the absence of a clearer statement by the Supreme Court or en bane reconsideration of the issue, this panel is bound by circuit precedent." *Allison*, 151 F.3d at 411 n. 3; see also *Coleman v. GMAC*, 296 F.3d 443, 447 (6th Cir.2002) (expressing doubt that damages can be awarded in a (b)(2) class but declining to decide the issue). The Seventh Circuit noted that, in *Ortiz* "[t]he Supreme Court stressed that proper interpretation of Rule 23, principles of sound judicial management, and constitutional considerations (due process and jury trial), all lead to the conclusion that in actions for money damages class members are entitled to personal notice and an opportunity to opt out."[8] *Jefferson*, 195 F.3d at 898.

The D.C. Circuit recently examined the development of (b)(2) class actions and whether notice and opt-out are appropriate in such cases:

> [A]s one commentator has noted, "as has become increasingly apparent since 1966, these amendments [authorizing injunctive and declaratory relief] created an

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[8] Although *Ortiz* involved a (b)(1) class, "these concerns would be applicable to any mandatory class, whether under Rule 23(b)(1) or (b)(2)." *Molski*, 318 F.3d at 949 n. 13.

> awkward mismatch between the subdivisions under which class actions are certified and the procedural protections to which a class is entitled." George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L.REV. 250, 260 (1996). This commentator has observed that "the Advisory Committee foresaw neither the surge in filings of Title VII class actions nor decisions that award individual compensatory relief based on findings of class-wide discrimination." George Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA, L.REV. 11, 25 (1983). Consequently, this commentator concludes, the Advisory Committee did not address the need for notice in Title VII class actions seeking compensatory as well as injunctive relief. *Id.; see also* WRIGHT, *supra*, § 1776, at 495. The Advisory Committee's lack of foresight in this regard may also explain Rule 23's failure to address the possible need for opt-out rights in non-(b)(3) actions. Several commentators have suggested that, despite the absence of any such requirement in Rule 23, where class members seek individual compensatory relief in addition to broad class-wide injunctive relief, it is appropriate for a court to afford them the procedural protections of notice and an opportunity to opt out. NEWBERG & CONTE, *supra*, § 4.15, at 4-51 to 4-52; Rutherglen, *Notice and Opt-Out, supra*, 71 N.Y.U. L.REV. at 274.

*Eubanks v. Billington*, 110 F.3d 87, 93 (D.C.Cir.1997).

Perhaps as a result of these concerns, recent decisions seem almost to conflate the (b)(2) and (b)(3) subsections. For example, the Seventh Circuit, noting that "[i]t is an open question in this circuit—and in the Supreme Court—whether rule 23(b)(2) ever may be used to certify a no-notice, no opt-out class when compensatory or punitive damages are in issue," has announced three alternatives to a straight (b)(2)

certification for cases that combine equitable or declaratory relief with money damages. *Jefferson*, 195 F.3d at 898. First, the trial court may certify the class under (b)(3) for all proceedings. *Id.* at 898. Second, the trial court could make a "divided certification," certifying a (b)(2) class for the equitable portion of the case and a (b)(3) class for the damages portion. Under that scenario, the court noted that the Seventh Amendment right to a jury trial would require adjudication of the (b)(3) claims before the (b)(2) claims, "even if adjudication of these claims decides the equitable claims as well." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577 (7th Cir.2000) (citing *Jefferson*, 195 F.3d at 898). The third option discussed in *Jefferson* is that the trial court might certify the class under (b)(2) for both monetary and equitable remedies but exercise its plenary authority to require individual notice and opt-out, "as though the class was certified under Rule 23(b)(3)." *Id.* In a similar vein, the D.C. Circuit has noted, in the context of a Title VII claim, "cases seeking individual monetary damages as well as classwide injunctive relief may be equally amenable to certification as (b)(3) actions, and 'the arguments supporting certification exclusively under subdivision (b)(2) are surprisingly weak.'" *Eubanks*, 110 F.3d at 93 n. 9 (quoting George Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA.L.REV. 11, 24 (1983)).

Under each of these scenarios, the net effect is that notice and opt-out would be provided to class members, thereby satisfying due process requirements. Once notice and opt-out are provided, however, (b)(2) classes become virtually indistinguishable from (b)(3) classes.[9] The Fifth Circuit recently recognized as much, noting that arguing over whether certification is proper under (b)(2) versus (b)(3) is a waste of resources. *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir.2004). In that case, African-American policyholders sued

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[9] As discussed more fully below, (b)(2)'s cohesiveness requirement parallels the predominance and superiority requirements of (b)(3).

three life insurance companies, alleging that the companies discriminated against them in the sale and administration of low-value life insurance policies. The plaintiffs moved for class certification under Rule 23(b)(2). Finding that plaintiffs' claims for monetary relief predominated over their claims for injunctive relief, the district court held that (b)(2) certification was inappropriate and refused to certify the class.

The Fifth Circuit reversed, noting "the futility of the district court's and the dissent's inquiry as to whether the 'prime goal' of the class is injunctive or monetary relief":

> The rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, "serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15. Therefore, to deny certification on the basis that the damage claims would be better brought as a rule 23(b)(3) class serves no function other than to elevate form over substance. Indeed, interests of judicial economy are best served by resolving plaintiffs' claims for injunctive and monetary relief together.

*Id.* at 417-18. The court then concluded that (b)(2) and (b)(3) "may work in tandem," noting that "[r]ule 23(b)(2) was adopted to facilitate the use of injunctive relief, not to compartmentalize claims for damages under rule 23(b)(3)." *Id.* at 417 n. 16 (citing WRIGHT & MILLER, *supra*, § 1775, at 470-71). Thus, the court reversed the trial court's order denying class certification and remanded the matter for further proceedings, noting that "[u]nder our precedent, should the class be certified on remand, class members must be provided adequate notice, and the district court should consider the possibility of opt-out rights."[10] *Id.* at 417.

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[10] Fifth Circuit precedent requires notice if a (b)(2) class seeks monetary relief. *Monumental Life*, 365 F.3d at 417 n. 15.

Accordingly, rather than focus on whether monetary relief predominates, or whether injunctive or declaratory relief will be necessary at some point, we hold that trial courts considering certification under (b)(2) must consider, and due process may require, individual notice and opt-out rights to class members who seek monetary damages under any theory. This conforms to United States Supreme Court guidance and discourages parties from artful pleading to circumvent what are perceived as stricter certification requirements under (b)(3). We recognize that (b)(2) played—and still plays—a valuable role in class action litigation. As used initially, primarily to stop classwide illegal treatment in the civil rights arena, (b)(2) filled a void that (b)(3) did not. With the evolution of the caselaw, the acceptance of the idea that injunctive or declaratory relief is available even under (b)(3), and the United States Supreme Court's growing concern about mandatory classes that include damages, however, a mandatory (b)(2) consumer class may deprive its members of due process rights.

In this case, the trial court certified a (b)(2) declaratory relief class "which, if granted, would lead to enforcement of the remedies permitted by the written warranty (of repair, replacement or refund)." The court then separately certified under (b)(2) "the counts for declaratory relief and breach of warranty that Compaq argues could become a predicate for money damages outside the four corners of the written warranty (money damages for, alternatively, breach by sale and breach by failure to repair)." As to the second (b)(2) class, the trial court noted that it understood that there was "the prospect for recovery of money damages within a TRCP 42(b)(2) class" but that "the declaratory relief sought . . . is not mere incidental baggage to the claim for money damages. . . ." The trial court also certified both the declaratory relief and the damage claims under (b)(3). Thus, all claims and all remedies were certified under both (b)(2) and (b)(3).

While the (b)(3) class would be automatically entitled to notice and opt-out, the trial court failed to even examine the possibility of notice and opt-out for the (b)(2) class.[11] In light of the concerns outlined above, we are reluctant to affirm a (b)(2) class that includes claims for damages without the concomitant protections afforded by notice and opt-out, and we cannot do so without knowing whether class members will be provided these protections. This is particularly true when, as here, the class has disclaimed consequential damages. If, in fact, some purchasers suffered such damages, their inclusion in a mandatory class may be improper; that is, due process may require that they be given notice of the class action and an opportunity to opt out and preserve their claims. In this case, the trial court wholly failed to address notice and opt-out rights for (b)(2) class members.[12] Because notice and opt-out must be determined before the parties can ascertain what their respective rights will be, an appellate court cannot effectively review a certification order that does not state how, if at all, these rights will be provided. While we cannot say that no (b)(2) class can be certified absent notice and opt-out rights to class members, we can state that, if damage claims are implicated, constitutional considerations will likely mandate such protections.

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[11] At the time the class was certified, rule 42 (unlike its federal counterpart) required individual notice to members of (b)(2) classes. *Compare* TEX.R. CIV. P. 42(c)(2), 553-554 S.W.2d (Tex.Cases) XXXVI-XXXVII (1977, amended 2004), *with* FED.R.CIV.P. 23(c)(2) (individual notice required only for (b)(3) classes). Rule 42 was recently amended to conform more closely to federal rule 23 and no longer mandates individual notice for (b)(2) classes. *See* TEX.R. CIV. P. 42(c)(2)(A) ("For any class certified under Rule 42(b)(1) or (2), the court *may* direct appropriate no tice to the class.") (emphasis added).

[12] The court of appeals appears to have been confused on this point. Although purportedly affirming only the (b)(2) class, that court held that individuals who suffered consequential damages would not be bound by the class judgment: "those parties can opt out of the class action and pursue their claims for data loss." 79 S.W.3d at 793.

The difficulty of reviewing a (b)(2) class that does not address notice and opt-out is evident when examining the first of the (b)(2) classes certified by the trial court. With regard to that class, we must consider whether declaratory relief, to the exclusion of damages, is appropriate in this case. The Fifth Circuit recently reversed certification of a (b)(2) class in a case involving breach of warranty, fraud, and negligent misrepresentation claims alleged against a motor home manufacturer by a putative class of motor home purchasers. *See McManus v. Fleetwood Enters.*, 320 F.3d 545 (5th Cir.2003). The purchasers alleged that the manufacturer misrepresented that the motor home could safely tow 3,500 pounds when, in fact, supplemental brakes were required to safely tow that weight. The purchasers alleged breach of express and implied warranty claims, as well as violations of California's consumer protection statute. They sought injunctive relief under (b)(2) to compel Fleetwood to provide supplemental brakes and accurate information about the towing limitations. In the alternative, the purchasers sought damages under (b)(3). The district court certified a Texas-only subclass, and Fleetwood appealed. The Fifth Circuit first examined the history of (b)(2) and then noted that:

> Here, unlike *Bolin* and *Allison*, the district court certified the class under both (b)(2) and (b)(3), and the plaintiffs seek injunctive relief and damages as alternative remedies. Thus, *Allison* and *Bolin* are slightly off the mark. We need not ask whether damages "predominate"; we ask only whether injunctive relief, to the exclusion of damages is appropriate under Rule 23(b)(2). We conclude that it is not.
>
> . . .
>
> The McManuses lawsuit is markedly different from the paradigm Rule 23(b)(2) class action. First, the ordinary relief for their lawsuit would be money damages, not injunctive relief.

. . .

> Second, Fleetwood sold its motor homes over a limited period of time to a limited number of purchasers and does not have an ongoing relationship with its purchasers. Third, Fleetwood would have to provide *individual* relief, based on the various models of motor homes, to each individual plaintiff having purchased a motor home between 1994 and 1999, as opposed to a "uniform group remedy."
>
> . . .
>
> These sharp differences make the class-wide injunctive relief contemplated under Rule 23(b)(2) inappropriate to this case. We could find no case where injunctive relief was awarded under comparable circumstances. This result is unsurprising because damages would be the superior remedy especially considering that some class members may already own, or have no need for, supplemental brakes. We emphasize that otherwise inappropriate injunctive relief does not become appropriate for class treatment merely because the more permissive Rule 23(b)(2), as opposed to (b)(3), contemplates injunctive relief. The district court abused its discretion in allowing the Rule 23(b) classifications to inform the appropriate remedy, instead of vice versa.

320 F.3d at 553-54 (emphasis in original) (citations omitted). Finally, the court concluded:

> Moreover, permitting this lawsuit to continue as a Rule 23(b)(2) class would undo the careful interplay between Rules 23(b)(2) and (b)(3). That is, the class members would potentially receive a poor substitute for individualized money damages without the corresponding notice and opt-out benefits of Rule 23(b)(3); and defendants would potentially be forced to pay what is effectively money damages, without the benefit of requiring

> plaintiffs to meet the rigorous Rule 23(b)(3) requirements. We conclude that the district court abused its discretion in certifying the class under Rule 23(b)(2).

*Id.* at 554 (citation omitted).

We share the same concerns about plaintiffs' claims for declaratory relief—to the exclusion of damages—in this case. The ordinary remedy for a breach of warranty claim is damages, not declaratory relief like that sought here. *See, e.g.*, TEX. BUS. & COM. CODE § 2.714(b) ("The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."). Plaintiffs' expert witnesses testified variously that: "the instant case . . . is a commercial case asserting at bottom damages for breach of an express warranty"; "this is a garden variety, plain vanilla consumer class action for modest damages per unit"; and "[t]his is a classic 'consumer' class action in which the claimed injuries are economic in scope." Similarly, Compaq sold the thirty-seven affected Presario models to the purchasers but, in all likelihood, does not have an ongoing relationship with them. Thus, relief would have to be individualized, at least to some extent. Purchasers who bought the affected computers may no longer own them. Like the Fifth Circuit in *Fleetwood*, "we could find no case where injunctive relief was awarded under comparable circumstances." *Fleetwood*, 320 F.3d at 554. Rather, as to the (b)(2) claims for declaratory relief to the exclusion of damages, it appears the plaintiffs have tried to "shoehorn" their damages action into the "(b)(2) framework, depriving class members of notice and opt-out protections." *Bolin*, 231 F.3d at 976. We note, however, that these concerns will become largely irrelevant if, on remand, the trial court orders notice and opt-out for the (b)(2) class members.

## IV

### Cohesiveness v. Predominance and Superiority

We now turn to whether parties may evade *Bernal* by seeking (b)(2) certification. Put simply, they may not. Although (b)(2) does not explicitly require predominance and superiority as (b)(3) does, (b)(2) does require a rigorous analysis of "cohesiveness." *See, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir.1998) (noting that "[w]hile 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive"). Generally, (b)(2) classes are premised on an assumption of homogeneity. *See Allison*, 151 F.3d at 413 ("[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogeneous and cohesive group with few conflicting interests among its members."). They are presumed to be cohesive, hence notice and opt-out are not mandated by the rules. *See Holmes v. Cont'l Can Co.*, 706 F.2d 1144. 1155 n. 8 (11th Cir.1983) ("At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness. . . . Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries. The members of a (b)(2) class are generally bound together through 'preexisting or continuing legal relationships' or by some significant common trait such as race or gender.") (quoting Note, *Notice in Rule 23(b)(2) Class Actions for Monetary Relief-Johnson v. General Motors Corp.*, 128 U. PA. L.REV. 1236, 1252-53 (1980) (footnotes omitted)). "[T]he predomination requirement of Rule 23(b)(2) serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions." *Allison*, 151 F.3d at 414-15; *see also Coleman*, 296 F.3d at 448; *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F.Supp.2d 942, 955 (E.D.Tex.2000) (predomination "protects absent plaintiffs' rights to due process by showing that a class is cohesive").

We disagree, therefore, with the trial court's statement that "[n]amed Plaintiffs are *not* required to show predominance, superiority, or manageability in order to certify a class under TRCP 42(b)(2)." (Emphasis in original.) Similarly, parties cannot evade the "rigorous analysis" requirement by seeking (b)(2) certification. In *Bernal*, we held that "[c]ourts must perform a 'rigorous analysis' before ruling on class certification to determine whether *all* prerequisites to certification have been met." *Bernal*, 22 S.W.3d at 435 (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)) (emphasis added). All prerequisites means all prerequisites. This includes all four elements of rule 42(a) as well as one of several elements of rule 42(b). If (b)(2) certification is sought, therefore, the trial court must rigorously analyze cohesiveness.

We recognize that "[c]lass cohesion is not a self-defining concept. How much cohesion is needed logically should depend on whether the class member has a right to exit." John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L.REV. 370, 435 (2000). In many cases, this analysis will be identical to the "predominance and superiority" directive undertaken by trial courts certifying (b)(3) classes. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (predominance "tests whether proposed classes are sufficiently *cohesive* to warrant adjudication by representation") (emphasis added). However, "a more rigorous definition of class cohesion should apply in the case of the mandatory class action where the class member is essentially being coerced into participation." Coffee, *supra*, at 435. As the Third Circuit has noted, in such cases a (b)(2) class "may require more cohesiveness than [a] (b)(3) class. This is so because in [a] (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Barnes*, 161 F.3d at 142-43; *see also* Coffee, *supra*, at 435 (noting that the *Barnes* court's cohesiveness "logic not

only makes good normative sense, but it supplies the necessary deterrent to prevent the misuse of Rule 23(b)(1) and (b)(2) class actions as a means of evading the greater procedural protections built into Rule 23(b)(3)"). Of course, if a trial court determines that notice and opt-out should be provided in the (b)(2) setting, the cohesiveness required in a (b)(2) class need not be greater than the predominance and superiority necessary for a class certified under (b)(3).

In this case, in addition to the notice and opt-out issues identified above, the trial court did not rigorously analyze cohesiveness. For these reasons, we reverse that part of the court of appeals' judgment affirming certification of the (b)(2) class. Because the court of appeals also affirmed certification under (b)(3), we now turn to those allegations.

V

Choice of Law

Although we review the trial court's order for abuse of discretion, we do not indulge every presumption in its favor, as compliance with class action requirements must be demonstrated rather than presumed. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675. 691 (Tex.2002). We also must evaluate "the claims, defenses, relevant facts, and applicable substantive law." *Bernal*, 22 S.W.3d at 435. In so doing, trial courts must abandon the practice of postponing choice-of-law questions until after certification, as courts can hardly evaluate the claims, defenses, or applicable law without knowing what that law is. *See Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 351-52 (Tex.App.-Houston [14th Dist.] 2003, no pet.); *see also Spence v. Clock*, 227 F.3d 308, 313 (5th Cir.2000) (holding that "[t]he district court is required to know which law will apply before it makes its predominance determination").

As more fully set forth above, the trial court's order—which came after *Bernal* but before *Schein*—stated that "no

Texas Supreme Court case requires this Court to make a choice of law determination at this time." Accordingly, the trial court identified "the choice of law rulings that it likely will make based on the disputed certification record." The trial court stated that it "believe[d] that it can properly apply Texas law to all claims covered by this nationwide class action" but concluded that it would revisit the issue if Compaq sought to litigate an issue on which Texas law differed from other jurisdictions. We rejected this "certify now and worry later" approach in *Bernal. Bernal*, 22 S.W.3d at 435. Instead, when ruling on motions for class certifications, trial courts must conduct an extensive choice of law analysis before they can determine predominance, superiority, cohesiveness, and even manageability. Thus, we proceed first to an analysis of the choice of law.

Compaq challenges the trial court's belief that Texas law governs all class members' claims. Generally, the issue of which state's law applies is a question of law we resolve by reviewing the record de novo. *Minn. Mining & Mfg. Co. v. Nishika, Ltd.*, 955 S.W.2d 853, 856 (Tex.1996); *see also Brainard v. State*, 12 S.W.3d 6, 30 (Tex.1999) ("In applying [abuse of discretion] standard, we defer to the trial court's factual determinations if they are supported by the evidence and review its legal determinations de novo."). In the context of a nationwide class action, the determination of the applicable substantive law is of paramount importance. If the court does not know which states' laws must be applied, it cannot determine whether variations in the applicable laws would defeat predominance in a (b)(3) class action or destroy the cohesiveness of a (b)(2) class. *See, e.g., In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133. 146 (E.D.La.2002) ("The need for manageability at trial which has been clearly recognized by the Fifth Circuit and other circuits in (b)(3) actions also exists in (b)(2) actions. The application of multiple state laws to a class makes manageability more difficult in both (b)(3) and (b)(2) class actions.").

If the laws of fifty-one jurisdictions apply in this class action, the variations in the laws of the states and District of Columbia "may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir.1996). The threshold question for this Court, therefore, is whether the trial court conducted a proper choice of law analysis and correctly decided that Texas law controlled. *Spence*, 227 F.3d at 311; *Castano*, 84 F.3d at 741. In reviewing the trial court's decision, we must first decide whether Texas law conflicts with the laws of other interested states, as there can be no harm in applying Texas law if there is no conflict. The class representatives bear the burden of establishing the prerequisites for class treatment, so they must present an extensive analysis of state law evaluating any differences. *See Spence*, 227 F.3d at 313. A court may not accept "on faith" a party's assertion that no variations in state laws exist; plaintiffs, as class action proponents, must show that it is accurate. *Castano*, 84 F.3d at 741.

The trial court found that it could apply Texas law to all claims in part because "no real conflict between Texas law and the law of any other jurisdiction with equally substantial connections to this dispute is currently presented." The trial court reached this conclusion after a cursory analysis of the law of other jurisdictions. While the court accurately noted that both parties submitted extensive choice-of-law research, expert reports, and summaries of the law, the trial court did not analyze the laws of the various jurisdictions, concluding instead in one sentence that "this Court finds that any variations in the law of the affected jurisdictions do not render the case unmanageable." Its only support for this statement was its criticism of Compaq's position, noting that "Compaq seems to think that it can forestall a class action by finding a conflict of law with respect to any issue that could conceivably arise in hypothetical warranty litigation." The trial court then noted that Compaq's corporate representative had testified that warranty claims were not affected by the state in

which the consumer lived. For those reasons, the trial court held that there was no real variation in the law of the affected jurisdictions on the legal theories alleged but stated that it would "revisit the matter, and with it the predominance inquiry, if and when Compaq actually seeks to litigate an issue concerning which Texas law conflicts with the law of some other state with contacts to this dispute that rival those of Texas." *See Castano*, 84 F.3d at 742-43 (criticizing the district court for "a cursory review of state law variations and [giving] short shrift to the defendants' arguments concerning variations"). Thus, "[n]othing in the record demonstrates that the court critically analyzed how variations in state law would affect predominance." *Id.* at 743.

The court of appeals also failed to undertake the critical analysis necessary to a proper choice-of-law determination. 79 S.W.3d at 791-92. On the choice-of-law issue, the court of appeals held only that federal cases relied on by Compaq were inapposite and that, under *Microsoft Corp. v. Manning*, 914 S.W.2d 602 (Tex.App.-Texarkana 1995, writ dism'd), Texas would recognize a warranty claim for a so-called "unmanifested defect." *Id.* at 792.

Thus, despite the extensive choice-of-law analysis presented by both sides, neither the trial court nor the court of appeals analyzed the differences, if any, of the laws of other states. Accordingly, "we do not have the benefit of an analysis of those differences by the lower courts." *Schein*, 102 S.W.3d at 697. As "guardian[s] of absent claimants' rights, courts have an independent duty to determine uniformity sua sponte, even if neither party raises it." *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 954 (Tex.1996); *see also Stirman v. Exxon Corp.*, 280 F.3d 554, 563 n. 7 (5th Cir.2002).

The lower courts erred by failing to conduct a state-by-state analysis of the questions of law presented. Those courts never assessed the substance of other states' laws but instead concluded that the theory was sound under Texas law. A

proper review would have analyzed the relevant law of each state and the variations among states. *Stirman*, 280 F.3d at 564-66. Below, we outline some of the differences in various states' laws, "to demonstrate the inquiry the [lower courts] failed to make." *Castano*, 84 F.3d at 743. While this case involves a Uniform Commercial Code breach of express warranty claim, it seems that "the Uniform Commercial Code is not uniform." *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1016 (D.C.Cir.1986) (citing J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed.1980)).

A. Notice

Section 2-607 of the UCC addresses notice of breach. The provision has been adopted verbatim by all states except Maine and South Carolina.[13] Maine does not require notice "where the remedy is for personal injury resulting from any breach." ME.REV.STAT. ANN. tit. 11, § 2-607(7) (West 1995). South Carolina does not require "notice of injury to the person in the case of consumer goods." S.C.CODE ANN. § 36-2-607(3) (Law. Co-op 1976). Even discounting these differences, however, cases from different jurisdictions interpret the notice requirement differently. Some states require that notice of a warranty claim against a remote manufacturer be given directly to that entity. *See The Church of the Nativity of Our Lord v. WatPro, Inc.*, 474 N.W.2d 605, 609 (Minn. Ct.App.1991) ("jurisdictions are divided on the issue . . . whether a buyer must also notify the manufacturer in order to sue the manufacturer for breach of warranties."); *Halprin v. Ford Motor Co.*, 107 N.C.App. 423, 420 S.E.2d 686, 688 (1992) ("the jurisdictions are split on whether this notice provision of the Code requires notice to the remote manufacturer"). For example, in *Wilcox v. Hillcrest Memorial Park of Dallas*, the court held that section 2.607(c)(1) "requires

[13] The Oklahoma statute differs in that subsection (6) refers to 2-312(3)(b), rather than 2-312(3).

that a buyer notify any seller, including a remote seller such as the manufacturer, of the product's alleged defect within a reasonable time of discovering the defect and that failure to do so bars the buyer from any remedy for breach of warranty under the Texas Business & Commerce Code."[14] *Wilcox*, 696 S.W.2d 423, 424-25 (Tex.App.-Dallas 1985, writ ref'd n.r.e.); *accord U.S. Tire-Tech, Inc. v. Boeran, B.V.*, 110 S.W.3d 194, 199 (Tex.App.-Houston [1st Dist.] 2003, pet. denied) (requiring notice to manufacturer); *Western Equip. Co. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo.1980) (same).

Conversely, the Colorado Supreme Court has held that:

> [T]he language of section 4-2-607(3)(a) is unambiguous: it requires a buyer to give notice of a defective product only to the 'seller.' *See* 2-Anderson, Uniform Commercial Code § 2.607:24. The General Assembly has not elected to require advance notice to a manufacturer of litigation for breach of the manufacturer's warranty of a product, and we find no compelling reason to create such a condition precedent judicially in the context of commercial litigation.

*Cooley v. Big Horn Harvestore Systems, Inc.*, 813 P.2d 736, 741 (Colo.1991) (noting that Maryland courts reached a similar result but Alaska, Illinois, and Wyoming did not); *see also Cipollone v. Liggett Group, Inc.*, 683 F.Supp. 1487, 1497-98 (D.N.J.1988) (predicting that New Jersey Supreme Court would require notice to immediate seller only); *Owens v. Glendale Optical Co.*, 590 F.Supp. 32, 36 (N.D.Ill. 1984) ("Illinois law holds that notification of a breach need only be given to the immediate seller"); *Firestone Tire & Rubber Co.*

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[14] Finding no reversible error, we refused the writ of error in *Wilcox*, expressly reserving judgment on the question of whether a buyer must notify a remote seller-manufacturer of an alleged breach of warranty within a reasonable time. *Wilcox v. Hillcrest Mem'l Park of Dallas*, 701 S.W.2d 842, 843 (Tex.1986). We have not since decided the issue.

*v. Cannon*, 53 Md.App. 106, 452 A.2d 192, 198 (1982) ("seller" in 2-607 means only the immediate seller); *Seaside Resorts, Inc. v. Club Car, Inc.*, 308 S.C. 47, 416 S.E.2d 655, 663 (Ct.App.1992) (section 2-607 "requires a retail buyer to notify only the retail seller who tendered the goods to him, not wholesalers, distributors, manufacturers, or others who sold the goods further up the chain of commerce"). Still other states have softened or eliminated the notice requirement altogether in cases involving consumer transactions. *Firestone*, 452 A.2d at 197 ("it is not difficult to imagine the injustice that would be caused to consumers from requiring notice to each person in the chain"); *Fischer v. Mead Johnson Labs.*, 41 A.D.2d 737, 341 N.Y.S.2d 257, 259 (N.Y.App. Div.1973) (timely notice requirement should be overlooked in case involving user of prescription drug).

These differences are significant. In this case, the parties dispute whether the notice requirement has been satisfied. Compaq denies that it received pre-suit notice from most of the putative class members; conversely, one of the named plaintiffs claims to have met the notice prerequisite by giving Compaq written notice on behalf of the entire uncertified class. This issue may be critical. If, for example, a putative class member lived in a state that required notice only to the immediate seller (and not the manufacturer), and that class member notified the immediate seller of the product defect, that class member should be deemed to have satisfied the notice requirement even if the manufacturer was not specifically advised of the claim. On the other hand, if that class member lived in a state that required notice to the manufacturer, failure to give that notice could bar the claim.

B. Reliance

Section 2-313 of the UCC addresses the creation of express warranties. That section incorporates a reliance element, providing that a seller's statement that is "part of the basis of the bargain" creates an express warranty. U.C.C. § 2-313.

This provision has been adopted verbatim by all states except Maine, Michigan, and South Carolina, which adopted the section with minor changes. South Carolina added language to section 2-313(1)(a), so that it reads: "Any affirmation of fact or promise, *including those on containers or labels*, made by the seller to the buyer, *whether directly or indirectly*, which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise." S.C.Code Ann. § 36-2-313(1)(a) (Law.Co-op.1976) (emphasis added to show additions).

Although the official comments to section 2-313 provide that "no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement," U.C.C. § 2-313 cmt. 3 (1989), it appears that this suggestion is not uniformly followed. Like the notice requirement, state courts have interpreted this reliance element differently. *See McManus. v. Fleetwood Enters., Inc.*, 320 F.3d 545, 550 (5th Cir.2003) ("There is a split of authority as to whether [the "basis of the bargain"] wording . . . is meant to dispense with the common law's requirement of reliance in express warranty cases.") (citing Charles A. Heckman, *"Reliance" or "Common Honesty of Speech": The History and Interpretation of Section 2-313 of the Uniform Commercial Code?*, 38 CASE W. RES. L.REV. 1 (1987)). Some courts have concluded that reliance by a buyer on a seller's statements (even those contained in a warranty) remains an essential element of a breach of express warranty claim under the basis of the bargain test as set forth in the UCC. *See, e.g., Speed Fastners, Inc. v. Newsom*, 382 F.2d 395, 397, 399-400 (10th Cir.1967) (sale of stud fasteners; plaintiff not entitled to recover in breach of express warranty where no evidence that plaintiffs employer relied on statements in seller's pamphlet before purchase); *Dilenno v. Libbey Glass Div., Owens-Ill., Inc.*, 668 F.Supp. 373, 376 (D.Dc.1987) (reliance required to assert express warranty claim under Delaware UCC); *Global Truck*

*& Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F.Supp. 641, 651-52 (N.D.Miss.1986) (buyer could not recover for breach of express warranty absent proof that buyer relied on statements prior to or contemporaneously with sale); *Hagenbuch v. Snap-On Tools Corp.*, 339 F.Supp. 676, 680 (D.N.H.1972) (sale of hammer; plaintiff not entitled to recover for breach of express warranty where no evidence that buyer relied on statements in seller's catalogue); *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136, 147 (1992) ("When a buyer is not influenced by the statement in making his or her purchase, the statement is not a basis of the bargain."); *Stamm v. Wilder Travel Trailers*, 44 Ill.App.3d 530, 3 Ill.Dec. 215, 358 N.E.2d 382, 385 (1976) ("cases under the [Illinois] Commercial Code require a reliance by the buyer upon the promise, affirmation or description."); *Scaringe v. Holstein*, 103 A.D.2d 880, 477 N.Y.S.2d 903, 904 (1984)(same); *Thomas v. Amway Corp.*, 488 A.2d 716, 720 (R.I.1985) (plaintiff must prove reliance in an express warranty action).

Other courts hold that under the UCC, reliance is no longer required and a buyer may recover on an express warranty even if the buyer never actually received a copy of the warranty and was unaware of its existence. *See, e.g., Lutz Farms v. Asgrow Seed Co.*, 948 F.2d 638, 645 (10th Cir.1991) (seed brochure; reliance not required under Colorado law); *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 55 Ala.App. 525, 317 So.2d 493, 497 (1975), *cert. denied*, 294 Ala. 775, 317 So.2d 500 (1975) (sale of mobile home; unnecessary to show "any particular reliance" by purchaser even though purchaser did not physically receive written copy of the warranty and was unaware of its existence); *Torres v. Northwest Eng'g Co.*, 86 Hawai'i 383, 949 P.2d 1004, 1013 (Ct.App.1997) ("reliance is not an essential element of a breach of express warranty claim under the UCC"); *Hawkins Constr. Co. v. Matthews Co.*, 190 Neb. 546, 209 N.W.2d 643, 654-55 (1973) (sale of scaffolding; express warranty created even if buyer did not rely on statements in seller's brochure), *overruled on other*

*grounds by Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983); *Daughtrey v. Ashe*, 243 Va. 73, 413 S.E.2d 336, 338-39 (1992) ("basis of the bargain" does not establish "a buyer's reliance requirement"; "We conclude from the language used in Code § 8.2-313 and the Official Comment thereto that the drafters of the Uniform Commercial Code intended to modify the traditional requirement of buyer reliance on express warranties.").

Still other states have not decided whether reliance is required, nor what the "basis of the bargain" actually means. *See* James J. White, *Freeing the Tortious Soul of Express Warranty Law*, 72 TUL. L.REV. 2089, 2099-2102 (June 1998) ("The great majority of cases [surveyed regarding § 2-313] had no explicit statement on whether basis of the bargain did or did not require reliance, but one might draw inferences about courts' views based upon what was said and what was left unsaid in the opinions. . . . Many of the cases that do not explicitly mention basis of the bargain as a reliance requirement nevertheless are careful to point out that the plaintiff in that case did rely. Others merely reiterate the basis of the bargain language."). Under Texas law, we have said that "[r]eliance is . . . not only relevant to, but an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent). . . ." *Schein*, 102 S.W.3d at 686. In an earlier case, we held:

> Though not a fraud-based claim, an express warranty claim also requires a form of reliance. The Uniform Commercial Code provides that an express warranty is created when "[a]ny affirmation of fact or promise [is] made by the seller to the buyer which relates to the goods and becomes part of the *basis of the bargain*." TEX. BUS. & COM.CODE 2.313(a)(1) (emphasis added). "Basis of the bargain" loosely reflects the common-law express warranty requirement of reliance.

*American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex.1997) (citing in part *Southwestern Bell Tel. Co. v. FDP Corp.*, 811 S.W.2d 572, 575 & n. 2 (Tex.1991) and *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 786 (Tex. 1967)).

Another difference among states is the timing of reliance and, specifically, whether warranties not relied on prior to the sale can form the basis of an express warranty claim. *Compare Downie v. Abex. Corp.*, 741 F.2d 1235, 1238 n. 1, 1240 (10th Cir.1984) (under both Utah and California law, UCC "clearly contemplates that warranties made after the sale may become a basis of the bargain"), and *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or. 783, 572 P.2d 1322, 1326 (1977) (post-sale survey of a used boat can create an express warranty if it "induce[d] and [was] intended by the Seller to induce Buyer's satisfaction with the agreement just made"), *with Dilenno*, 668 F.Supp. at 376 (express warranty claim failed where there was no evidence plaintiff saw the warranty before making her purchase), *Ciba-Geigy Corp.*, 834 S.W.2d at 147 (breach of express warranty claim failed when plaintiff did not recall reading the express warranty before making his purchase), *Schmaltz v. Nissen*, 431 N.W.2d 657, 661 (S.D.1988) (language on seed bags could not have been basis of the bargain, when purchasers did not read the language until after the sale was completed), *Cuthbertson v. Clark Equip. Co.*, 448 A.2d 315 (Me.1982) (owner's manual not seen prior to sale could not be part of "basis of the bargain"), and *Anderson v. Heron Eng'g Co.*, 198 Colo. 391, 604 P.2d 674, 676 (1979) (brochure must have been seen or relied on at time of purchase).

C. Remedies

Finally, we examine the remedies available under the various states' laws. Section 2-714 of the UCC provides:

> (1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) he may

> recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> (2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

This provision has been adopted verbatim by all states except Alabama, which adds that this section shall not limit a seller's liability for personal injury damages involving consumer goods. ALA.CODE § 7-2-714 (2004). The UCC official comment explains: "The 'non-conformity' referred to in subsection (1) includes not only breaches of warranties but also any failure of the seller to perform according to his obligations under the contract." U.C.C. 2.714, cmt. 2.

Of primary import here is whether plaintiffs can recover on express warranty claims based on so-called unmanifested defects. Compaq argues that most states do not allow breach of warranty claims for products that have not malfunctioned. The plaintiffs respond that, under the UCC, all they must prove is a non-conformity of tender to recover "benefit of the bargain damages."

The law on this particular subject does not appear to be well developed in any jurisdiction. Compaq cites a few cases, some of which involve express warranty claims and some of which do not, for the proposition that most states reject such a claim. Chief among these is *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir.2002). In that case, plaintiffs sued Bridgestone/Firestone, alleging that the tires on their vehicles

were defective. Plaintiffs moved for class certification, and the district court certified two nationwide class actions. Bridgestone/Firestone appealed. The Seventh Circuit Court of Appeals reversed, noting:

> Plaintiffs describe the injury as financial rather than physical and seek to move the suit out of the tort domain and into that of contract (the vehicle was not the flawless one described and thus is not merchantable, a warranty theory) and consumer fraud (on the theory that selling products with undisclosed attributes, and thus worth less than represented, is fraudulent). It is not clear that this maneuver actually moves the locus from tort to contract. If tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation. As a result, most states would not entertain the sort of theory that plaintiffs press. *See, e.g., Briehl v. General Motors Corp.*, 172 F.3d 623, 628 (8th Cir.1999) (Mississippi, New York, Pennsylvania, and Texas law); *Angus v. Shiley, Inc.*, 989 F.2d 142, 147-48 (3d Cir.1993) (Pennsylvania law); *Willett v. Baxter International, Inc.*, 929 F.2d 1094, 1099-1100 (5th Cir.1991) (Louisiana law); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir.1989) (South Carolina law); *American Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291, 44 Cal.Rptr.2d 526 (1995); *Ford Motor Co. v. Rice*, 726 So.2d 626, 627, 631 (Ala.1998); *Yu v. IBM Corp.*, 314 Ill.App.3d 892, 732 N.E.2d 1173, 247 Ill. Dec. 841 (1st Dist.2000); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky.1994).

288 F.3d at 1017 (footnote omitted).

We note, however, that the *Bridgestone/Firestone* court did not address the plaintiffs' express warranty claim. Moreover, the tires in that case had already been recalled and replaced, possibly satisfying any express warranty requirements. Many

of the cases relied on by the Seventh Circuit did not involve express warranty claims but instead involved implied warranty and tort claims. *See, e.g., Angus v. Shiley. Inc.*, 989 F.2d 142, 147-48 (3d Cir.1993) (intentional and negligent infliction of emotional distress); *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1098-1100 (5th Cir.1991) (failure to warn); *Carlson v. General Motors Corp.*, 883 F.2d 287, 298 (4th Cir.1989) (implied warranty); *Ford Motor Co. v. Rice*, 726 So.2d 626, 627, 631 (Ala.1998) (fraudulent suppression); *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187, 192 (Ky. 1994) (negligence and intentional infliction of emotional distress); *Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291, 44 Cal.Rptr.2d 526, 528 (1995) (implied warranty).

Conversely, however, there is a dearth of caselaw recognizing such claims in the express warranty context. The Fifth Circuit Court of Appeals recently examined whether, under Texas and Florida law, a boat purchaser had stated a claim against a boat manufacturer, who had allegedly represented a hybrid plywood/fiberglass boat to be all fiberglass. *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449 (5th Cir.2001). The district court dismissed the case pursuant to Rule 12(b)(6). Fed.R.Civ.P., concluding that the plaintiffs had failed to allege any real damages. On appeal, the Fifth Circuit noted that "[t]he only damage sought by the [purchasers] is the benefit of their bargain . . . or the difference in value between what they were promised, an all fiberglass boat, and what they received, a hybrid wood-fiberglass boat." 240 F.3d at 452. The court continued:

> Along with the "out of pocket" damages formula, which measures the difference between what the plaintiff paid in consideration and what he actually received, "benefit of the bargain" is a standard method for measuring damages in fraudulent representation and certain con-

> tract cases. The benefit of the bargain measure of damages is neither novel nor exotic. . . .
>
> As the Coghlans contend, Texas and Florida permit recovery of benefit of the bargain damages in certain contexts.

*Id.* at 452-53 (citations omitted). The court then concluded that both Texas and Florida permitted recovery of such damages for fraud, DTPA, and breach of contract claims (no express warranty claim was alleged), and Florida also recognized such damages in negligent misrepresentation cases. The court noted:

> While we share the district court's implicit concern over the rise of 'no-injury' product liability lawsuits, the district court acted prematurely in dismissing this case *sua sponte* on the pleadings: the determination that there has been no injury in this case must be an evidentiary one, since the relevant state jurisdictions recognize benefit of the bargain damages for the claims that the Coghlans allege.

*Id.* at 454 (footnote omitted). In a footnote, the court explained the distinction:

> The key distinction between this case and a "no injury" product liability suit is that the Coghlans' claims are rooted in basic contract law rather than the law of product liability: the Coghlans assert they were promised one thing but were given a different, less valuable thing. The core allegation in a no-injury product liability class action is essentially the same as in a traditional products liability case: the defendant produced or sold a defective product and/or failed to warn of the product's dangers. The wrongful act in a no-injury products suit is thus the placing of a dangerous/defective product in the stream of commerce. In contrast, the wrongful act alleged by the Coghlans is Wellcraft's failure to uphold its end of their

> bargain and to deliver what was promised. The striking feature of a typical no-injury class is that the plaintiffs have either not yet experienced a malfunction because of the alleged defect or have experienced a malfunction but not been harmed by it. Therefore, the plaintiffs in a no-injury products liability case have not suffered any physical harm or out-of-pocket economic loss. Here, the damages sought by the Coghlans are not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain. It is worth noting that the no-injury approach to product litigation has been rejected in several recent decisions.

240 F.3d at 455 n. 4 (citations omitted).

Thus, to the extent they have squarely analyzed (and very few have) whether to permit express warranty claims for unmanifested defects, courts reach different results. While the law of some states appears to conflict, the law in most states (including Texas)[15] is unclear. Some states may recognize such claims, but we cannot say that all fifty-one jurisdictions would. In *Schein*, we cautioned against class certification in which judges and lawyers had to guess, "What is the law of Michigan, or Arkansas, or Guam, as applied to this problem?" *Schein*, 102 S.W.3d at 700 (quoting *Bridgestone/*

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[15] We do not reach the issue in this case but note that, in varying contexts, our courts of appeals have reached different conclusions on whether parties may recover damages for unmanifested defects. *Compare Tracker Marine*, 108 S.W.3d at 362 (noting that benefit of the bargain damages for unmanifested defects "look[ ] suspiciously like a claim for fear of future injury to property, which Texas has rejected") (citation omitted) *with Microsoft Corp. v. Manning*, 914 S.W.2d 602. 609 (Tex. App.-Texarkana 1995, writ dism'd) (recognizing breach of warranty claim for unmanifested defect: "We believe that, if appellees prove that an individual defect exists in all original MS-DOS 6.0 software, it is not necessary for the purchasers to actually suffer a loss of data as a result of that defect for them to suffer damage. They have received less than they bargained for when they acquired the product.").

*Firestone*, 288 F.3d at 1020) (emphasis in original); *see also Tracker Marine*, 108 S.W.3d at 363 (noting that "[t]he novelty and complexity of these issues counsels against any sort of mass trial until some of them are settled").

The conflicts on this and the other issues outlined above are substantial. Nor is mention of these conflicts, as the trial court suggested, necessarily an attempt to "forestall a class action by finding a conflict of law with respect to any issue that could conceivably arise in hypothetical warranty litigation." Each of the issues outlined above impacts either an element of, or a condition precedent to, a UCC-based express warranty claim. *See, e.g., Schein*, 102 S.W.3d at 686 ("[r]eliance is . . . an element of proof of, plaintiffs' claims of breach of express warranty (to a certain extent)"); *U.S. Tire-Tech*, 110 S.W.3d at 200 (collecting cases from multiple jurisdictions holding that notice is a condition precedent to a breach of express warranty claim). We cannot, therefore, affirm the application of Texas law on the basis that the law of all jurisdictions is identical. Instead, to review how the class claims will be tried, we must first review which law will apply. *See Tracker Marine*, 108 S.W.3d at 354-55.

D. Most Significant Relationship

The Due Process Clause limits the extent to which one state's law can be applied to claims that arise in many states. *See Shutts*, 472 U.S. at 821-22, 105 S.Ct. 2965. Absent a contractual choice-of-law provision, express warranty claims in Texas may be governed by Texas law if the "transaction[ ] bear[s] an appropriate relation to this state." TEX. BUS. & COM.CODE § 1.301(a). In this case, the parties have asserted, and the trial court applied, the Restatement's "most significant relationship" test. Accordingly, we will examine the contacts under that standard.

*Section 188 of the Restatement (Second) of Conflict of Laws* delineates the general principles that inform a choice of

law determination on a contract issue. They include: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the contract's subject matter; and (5) the domicile, residence, place of incorporation and place of business of the parties. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188.

The trial court found that "Compaq is headquartered in Texas and incorporated here." The trial court then listed Compaq's Texas contacts and noted:

> Compaq's only possible response to this analysis is the argument that each buyer's domicile determines the law that must be applied to that buyer's claim. This is in fact what Compaq asserts. On this disputed record, the Court does not find that argument supported by the record.

In *Schein*, we stated that "Texas . . . does not apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged. . . ." *Schein*, 102 S.W.3d at 698. In the DTPA context, one court has commented that "Texas courts have usually applied our statute to consumer complaints that arose here regardless of the defendant's headquarters." *Tracker Marine*, 108 S.W.3d at 355. The Seventh Circuit has termed a district court's application of the law of the manufacturer's domicile to all consumer complaints "a novelty." *Bridgestone/Firestone*, 288 F.3d at 1016.

The putative class members are domiciled in the fifty states and the District of Columbia. All these fifty-one relevant jurisdictions are likely to be interested in ensuring that their consumers are adequately compensated for a breach of warranty. *See Spence*, 227 F.3d at 314. Texas law may not provide sufficient consumer protection in the view of the other states; indeed, as the home state of the manufacturer, Texas's "policies might tend to favor those interests over consumers." *Id.* (analyzing Georgia's interest). The place of

contracting would presumably be the place of purchase; the location of performance and the location of the subject matter of the contract would be the place where the computer is used; and the place of negotiation would not apply. *Id.* at 314 n. 9 (noting that "[r]elated state policies of all the interested states would also, of course, need to be examined for a thorough approach to this issue"); *see also Bridgestone/ Firestone*, 288 F.3d at 1016- 17 (in a lex loci delicti state, "[i]f recovery for breach of warranty . . . is possible, the injury is decidedly where the consumer is located, rather than where the seller maintains its headquarters") (emphasis in original). Thus, while Texas law will apply to claims by most of those who bought computers in this state, the class representatives have failed to demonstrate it will apply to the claims of out-of-state class members. *Tracker Marine*, 108 S.W.3d at 359. The differences in state law outlined above cannot be concealed in a throng. *Schein*, 102 S.W.3d at 693. The trial court abused its discretion, therefore, in holding that Texas law bore the most significant relationship to, and therefore governed, all class members' claims.

## VI

## Conclusion

We conclude that Rule 42(b)(3)'s predominance requirement is not satisfied. Accordingly, we need not consider Compaq's additional challenges to the other certification prerequisites. We reverse the court of appeals' judgment affirming the trial court's certification order and remand the case for further proceedings consistent with this opinion. TEX.R.APP. P. 60.2(d).

Chief Justice PHILLIPS did not participate in the decision.